Wixon Jewelers, Inc., 919 N.Y.S.2d 151, 152 (1st Dep't 2011) (holding that a party that repudiates or breaches a contract cannot then claim the benefits of that contract); *see also PAMI-LEMB I Inc. v. EMB-NHC, L.L.C.*, 857 A.2d 998, 1014-15 (Del. Ch. 2004).

In this connection, the members of the TPR Group are indistinguishable. The TPR Group repeatedly state that they are not a "group" and that the Sagi Trust and TPR are "distinct entities." (Opp'n Br. at 5). These arguments should lead the Court to question plaintiffs' credibility generally. One member of the TPR Group, Sagi, admittedly controls the other member of the group, TPR. *See TR Investors, LLC v. Genger*, 2013 WL 603164, at *5 ("Sagi had purchased control of TPR from his mother, Dalia, with whom he was aligned."). It also bears mentioning that the third member of the TPR Group, the Sagi Trust (of which Sagi is the primary beneficiary and the representative by assigment of its claims), is not a party to this lawsuit. Rather, Sagi (who participated in the negotiation of the Stockholders Agreement and signed the transfer documents on behalf of TPR) claims that he is suing personally on the basis of an unspecified "written assignment" from the Sagi Trust (Compl. ¶ 3) – although the assignment was not proffered in support of the Complaint or in this Opposition Brief.[6] Even if it were a party to this action, the Sagi Trust's alleged rights and injury in this litigation also arise entirely out of the TPR Group's wrongdoing – *i.e.*, TPR's impermissible transfer of shares. (Opp'n Br. at 19).

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[6] Although granting the motion to dismiss will moot this issue for the Trump Group, it bears noting that the Second Circuit has held that even though clients may give informed consent, it "has required that the court must be satisfied that the client 'knowingly and intelligently wishes to proceed with joint representation.'" *Oneida of Thames Band v. State of N.Y.*, 757 F.2d 19, 22 (2d Cir. 1985). At the very least, recognizing the TPR Group's propensity to revisit long-settled issues that had been resolved with their consent (*i.e.*, the sale by TPR of the Sagi Trust shares was on terms that were "fair, reasonable and acceptable"), the Trump Group would be "entitled to the assurance of an on-the-record consent sufficient to preclude any subsequent challenge to a judgment by either [client] because of [the] joint representation." *Id.* (suggesting trial court "ascertain in open court . . . that each client understands the potentially adverse nature of the claims and nonetheless prefers to be jointly represented").

II. THE COMPLAINT FAILS TO STATE ANY CLAIM FOR BREACH OF FIDUCIARY DUTY OR AIDING AND ABETTING SUCH A BREACH.

The Trump Brief conclusively demonstrated that the Complaint failed to state a claim against Trans-Resources for breach of fiduciary duty and aiding and abetting alleged breaches of fiduciary duty. (Trump Br. at 16-17). Specifically, with respect to the aiding and abetting portion of the TPR Group's claims, the Trump Group showed that, even assuming Arie and Dowd were acting in some capacity for Trans-Resources (which they were not) when Arie orchestrated the 2004 Transfers in order to resolve his marital issues and walked away from the Funding Agreement negotiations, Trans-Resources still cannot be liable for breaching any fiduciary duty or aiding and abetting a breach of fiduciary duty. (Trump Br. at 17). This Court has already held (in dismissing Arie's breach of fiduciary duty claims against TPR) that a corporate entity (as opposed to its directors or officers) owes no fiduciary duties to its stockholders. (*Id.*) And the TPR Group cannot circumvent this well-established rule by the transparent expedient of pleading that Trans-Resources aided and abetted Arie and Dowd in breaching their duties to the Trans-Resources purported stockholders. (*Id.*)

In opposition, the TPR Group abandon their claim for direct breach of fiduciary duty and concede there can be no aiding and abetting claim grounded on Arie's violation of his duties as a director or officer of Trans-Resources. (Opp'n Br. at 21-22). In so conceding, the TPR Group acknowledge that aiding and abetting claims are "limited to those cases where a plaintiff alleges only that a defendant corporation aided and abetted a breach of fiduciary duty owed by that corporation's directors or officers as such" – and then argues that Arie owed duties in other capacities. (Opp'n Br. at 21-22). Specifically, the TPR Group argue that (i) "Arie owed the Sagi Trust a fiduciary duty as a co-shareholder in TRI" in a "close corporation"; (ii) "as the Sagi Trust's proxy holder, Arie had 'superior knowledge of essential facts'" rendering non-disclosure inherently unfair; and (iii) Arie had a familial fiduciary duty or "acted . . . beyond the scope of his

agency," which "[i]f true, [means] TRI aided and abetted those wrongful acts as well." (Opp'n Br. at 22). None of these ever-changing arguments pass muster. *Cf. TR Investors, LLC v. Genger*, 2010 WL 2901704, at *12 (describing the Trump Group's efforts to address "ever-changing arguments as playing a game of 'Whack-a-Mole'").

First and foremost, Arie could not possibly have owed any duty as a "co-stockholder," because Arie was never a stockholder of Trans-Resources. The purported transfers to him were void. (*See* Dellaportas Aff. Ex. I, ¶ 4-5). And even if he had been a stockholder, Trans-Resources is not a "close corporation" of the kind where co-stockholders may owe mutual duties – as opposed to a "closely-held" corporation, a different animal – as the TPR Group surely knows. A "close corporation" is a special type of entity that requires specific provisions in the corporation's charter contained in 8 *Del. C.* § 342, which are nowhere to be found in the Trans-Resources charter (and are not alleged to be). *See Reis v. Hazelett Strip-Casting Corp.*, 28 A.3d 442, 451 (Del. Ch. 2011) (noting that the company "was simply a closely held corporation in the generic sense").

Second, the TPR Group offer no authority for the proposition that Arie, as a purported proxy holder, owed a duty by virtue of any "superior knowledge of essential facts render[ing] non-disclosure inherently unfair." (Opp'n Br. at 22). Indeed, in the only case cited by the TPR Group in support of their position, the Appellate Division ***dismissed*** the plaintiff's claims, holding that "there was no duty to disclose." *Barrett v. Freifeld*, 908 N.Y.S.2d 736, 738 (2d Dep't 2010) (cited in Opp'n Br. at 22).

Third, if someone happens to be an executive, but breaches a duty solely in his personal capacity or "outside the scope of his agency," the corporation the executive serves cannot be held liable – precisely because the executive is acting outside the scope of his employment. *See Arnold v. Soc'y for Sav. Bancorp., Inc.*, 678 A.2d 533, 539 (Del. 1996) (rejecting argument that corporate entity could be liable for the actions of its directors because, among other things,

"[d]irectors, in the ordinary course of their service as directors, do not act as agents of the corporation. . . .") (citations omitted); *see also McArthur v. J.M. Main St., Inc.*, 847 N.Y.S.2d 233, 234 (2d Dep't 2007) (dismissing action to recover for alleged wrongs determined, as a matter of law, to be outside scope of the employment). The TPR Group offer no case law or other authority that would allow them to sidestep this hornbook rule by pleading alleged non-corporate fiduciary duties, and then claiming that the corporation aided and abetted a breach by the executive of those duties.

In this respect, the Opposition Brief improperly relies on allegations that appear nowhere in the Complaint, and are raised here for the very first time. For instance, the TPR Group argue – without citation to the Complaint – that "Arie was aware for months that the Trump Group was about to foreclose on the Sagi Trust Shares, and yet he actively took steps to conceal this information from Cross-Claimants, and indeed tried to misappropriate the Sagi Trust Shares for his own benefit." (Opp'n Br. at 22). Also without citation to the Complaint, the TPR Group claim that "[Trans-Resources'] CEO Dowd and its attorney Lentz actively collaborated with Arie on his 'shock and awe' scheme against Sagi" and conclude (without citation) that "Arie could not have gotten away with breaching these duties without the substantial assistance of TRI, including its CEO Dowd. . . ." (Opp'n Br. at 22-23). In fact, Lentz was ***not*** acting as company counsel; he was acting as Arie's personal counsel. *See* Ex. 2, *TR Investors, LLC v. Genger*, C.A. No. 3994-CS, Tr. Rul'g at 4-5 (Del. Ch. Sept. 18, 2009) ("I don't believe a reasonable reading of the document permits of the construction that the lawyer involved was representing anyone other than Mr. Genger personally. This is not at all written in a way that suggests that it is for the benefit of the entity and all of its stakeholders. It is entirely written as a partisan piece of strategic advice.") (emphasis added). And, Dowd – who the TPR Group acknowledges was Arie's "'loyal subordinate'" – also was acting on behalf of Arie's personal interests and not for the benefit of

Trans-Resources. (*See* Opp'n Br. at 22 (citing *TR Investors, LLC v. Genger*, 2010 WL 2901704, at *7).

Even were these newly minted assertions accurate (they are not), they must be ignored. *See MediaXposure Ltd. (Cayman) v. Omnireliant Holdings, Inc.*, 918 N.Y.S.2d 398, 2010 WL 4225939, at *5 (N.Y. Sup. Ct. Oct. 25, 2010) (TABLE) (denying plaintiffs' attempt "to amend the complaint through an opposition brief, which is not permissible. . . ."); *see also Hicinbothem v. Natural Golf Corp.*, 697 N.Y.S.2d 760, 761 (3d Dep't 1999) (affirming dismissal where plaintiffs relied on allegation made in their opposition brief but not the complaint).

III. THE COMPLAINT FAILS TO STATE CLAIMS FOR BREACH OF THE STOCKHOLDERS AGREEMENT.

In their opening brief, the Trump Group established that the TPR Group have no standing to enforce the Stockholders Agreement and have not sufficiently pleaded a cause of action for breach of the Stockholders Agreement. (*See* Trump Br. at 17-22). In the Opposition Brief, the TPR Group do not rebut that the Sagi Trust lacks standing, misreads the Stockholders Agreement as a matter of law and fails to provide any causal link between the alleged breaches of Sections 1.5, 2.2 and 2.4 of the Stockholders Agreement and its conclusory claims of damages.

First, the TPR Group improperly suggest that the Sagi Trust has standing under Section 6.2 of the Stockholders Agreement because it is "binding upon, and shall inure to the benefit of, the parties hereto, their legal representatives, and transferees in accordance with this Agreement, except as otherwise set forth herein." (Opp'n Br. at 23). But the Sagi Trust is neither a party to the Stockholders Agreement, nor a Permitted Transferee therein, and because the purported transfer to the Sagi Trust was void, it never became a stockholder. (*See* S.A. § 2.1; Dellaportas Aff. Ex. I, ¶ 4-5).

Second, the TPR Group cite language from the introductory section to the Court of Chancery's July 2010 opinion for their claim that Arie Genger personally, and not TPR, breached the

Stockholders Agreement. (Opp'n Br. at 23-24). This argument further reflects a willingness to misstate – and even ignore – that court's findings that TPR breached the agreement. (*See, e.g.*, Compl. ¶ 17: noting "***TPR*** agreed to proceed with the 2004 Transfers"). *See also TR Investors, LLC v. Genger*, 2013 WL 603164, at *1 ("[T]he transfer of the Trans-Resources stock out of TPR ***violated the terms of the Stockholders Agreement that TPR had signed*** with the Trump Group.") (emphasis added).

Third, the Opposition Brief reiterates the conclusory allegation that "TRI . . . breach[ed] the Stockholders Agreement" by not providing "information" about the Funding Agreement. (Opp'n Br. at 23-24). But the Stockholders Agreement on its face limits any disclosure obligations under Section 1.5 to only three types of "financial information": (i) "annual, quarterly and monthly Company financial statements"; (ii) "Company projections"; and (iii) "material reports from the Company to TPR regarding the Company's performance or prospects." (S.A. § 1.5). No matter how one parses the language of Section 1.5, the proposed Funding Agreement and related negotiations do not fall within any of these limited categories. The proposed Funding Agreement was not a "financial statement" for which "information" was required; it did not contain "Company projections"; and it was not a "material report" sent to TPR concerning "the Company's performance or prospects." (*Cf.* S.A. § 1.5).

The TPR Group cannot rewrite the contract to manufacture a breach for non-disclosure of a non-existent agreement. The plain meaning of the Stockholders Agreement controls, and under New York law, where, as here, "the agreement was negotiated by sophisticated and well-counseled parties, courts are 'extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include . . . .'" *Worcester Creameries Corp. v. City of N.Y.*, 861 N.Y.S.2d 198, 201 (3d Dep't 2008) (citation omitted). Thus, there could be no breach by Trans-Resources for non-disclosure, even if TPR had been a stockholder.

IV. THE COMPLAINT FAILS TO STATE A CLAIM AGAINST TRANS-RESOURCES FOR TORTIOUS INTERFERENCE WITH THE TRANSFER AGREEMENT.

In the Trump Brief, the Trump Group established that (i) the Sagi Trust cannot recover for tortious interference of contract where the underlying contract is void, and (ii) the Complaint does not credibly allege the elements of a claim for tortious interference with a contract. (Trump Br. at 22-23).

A tortious interference claim must allege (1) the existence of a valid contract between the plaintiff and a third party, (2) the defendant's knowledge of the contract, (3) the defendant's intentional procurement of the third party's breach of the contract without justification, (4) actual breach of the contract by the third party, and (5) resulting damages. *See Lama Holding Co. v. Smith Barney, Inc.*, 88 N.Y.2d 413, 424 (N.Y. 1996). (*See also* Trump Br. at 23-24).

The Delaware courts ruled that the 2004 transfers are void. Therefore, the Transfer Documents and 2004 Voting Trust Agreements are also void and unenforceable. (Rev. Fin. J. IN 10, 12, 14). Void agreements are a legal nullity incapable of being breached, *see 420 E. Assocs. v. Kerner,* 438 N.Y.S.2d 316, 318 (1st Dep't 1981) (quoting 9 N.Y. Jur., Contracts § 7) ("A void contract is no contract at all; it binds no one and is more a nullity."), and, therefore, cannot support a tortious interference claim.

The TPR Group also have never pleaded that the Transfer Agreement was enforceable, and it is black-letter law there is no cause of action for tortious interference with unenforceable contracts. *See Nixon Peabody LLP v. de Senihles, Valsamdidis, Amsallem, Jonath, Flaicher Assocs.,* 873 N.Y.S.2d 235, 2008 WL 4256476, at *10 (N.Y. Sup. Ct. 2008) (TABLE) ("These allegations would not state a cause of action for tortious interference with either existing or prospective contractual or economic relations because the July 2007 agreement is unenforceable . . . ."); *Savannah Bank*

v. Sav. Bank of Fingerlakes, 691 N.Y.S.2d 227 (4th Dep't 1999) (accord); *Jaffe v. Gordon,* 658 N.Y.S.2d 612 (1st Dep't 1997) (accord).[7]

In the Opposition Brief, the TPR Group object to the Trump Group's argument that Article 10 of the Stock Purchase Agreement provides an acknowledgment that the 2004 Transfers might not be valid. (Opp'n Br. at 26). The Court need not take the Trump Group's word for it; the Delaware Supreme Court has so held. (*See* Sup. Op. at 196 (noting, in Article 10, "both the purported transferor (TPR) and the purported transferee (the Sagi Trust) agreed on a mechanism whereby the Trump Group's share acquisition would be fully protected if the 2004 Transfers were determined to be void")).

For the foregoing reasons, and those in the Trump Brief, the claim for tortious interference should be dismissed.

V. THE COMPLAINT FAILS TO STATE A CLAIM AGAINST TRANS-RESOURCES FOR TORTIOUS INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONS.

In the Trump Brief, the Trump Group explained that "[a] claim for tortious interference with prospective business advantage must allege that: (a) the plaintiff had business relations with a third party; (b) the defendant interfered with those business relations; (c) the defendant acted with the sole purpose of harming the plaintiff or by using unlawful means; and (d) there was resulting injury to the business relationship." (Trump Br. at 25). Moreover, "[w]here there has been no breach of an existing contract, but only interference with prospective contract rights ... plaintiff must show more culpable conduct on the part of the defendant." (Trump Br. at 25). The Trump Brief demonstrated that the TPR Group failed to allege these elements adequately because the Sagi Trust and the Trump Group had no business relations before August 21,

[7] The TPR Group's only cited authority, *DePetris & Bachrach, LLP v. Srour*, 898 N.Y.S.2d 4, 7 (1st Dep't 2010), supports the Trump Group's position. The *Srour* court held that a claim for tortious interference with a contract will fail in the absence of a viable contract. *Id.*

2008; the TPR Group did not allege that the Trump Group acted with the "sole purpose of harming" the TPR Group; and the TPR Group could not claim that it suffered an injury to any relationship with the Trump Group, given that the Trump Group engaged in business relations with the TPR Group only after the proposed Funding Agreement did not materialize. (Trump Br. at 25-27).

In response, the TPR Group maintain that, but for Trans-Resources' "wrongful conduct," the Trump Group and the Sagi Trust "would have remained co-owners." (Opp'n Br. at 26). But such unsupported speculation cannot support a claim. *See Procapui-Productores de Camaroes de Icapui Ltda. v. Leyani*, No. 07-CV-6627 (BSJ), 2010 WL 2720584, at *2 (S.D.N.Y. June 22, 2010) ("A court need not defer to sweeping and unsupported allegations and conclusions" in assessing adequacy of complaint). Indeed, the portion of Mark Hirsch's testimony cited by the TPR Group undercuts any assertion that the Sagi Trust would have remained a co-owner. (Opp'n Br. at 8). At the time the proposed Funding Agreement was being discussed, everyone recognized that the Trump Group could exercise their purchase rights, which is evidenced by Arie's statement to the Trump Group, cited by TPR, that "it's even a better idea if you give me an option to buy whatever shares [you] end up getting from Sagi." (Opp'n Br. at 8 (quoting Dellaportas Ex. A at 18)). The TPR Group also assert that as of August 6, 2008, "this deal was still in place." (*Id.* at 8 (citing Dellaportas Ex. X)).

In any event, the TPR Group's rank speculation is also fundamentally implausible, given that the Stockholders Agreement was designed to prevent exactly what the TPR Group suggest, without support, would have occurred: the Trump Group's being forced to accept Sagi or his affiliates as co-owners of Trans-Resources. It is illogical to suggest that Trans-Resources could now be liable to the TPR Group for somehow failing to accommodate the exact state of affairs that the parties to the Stockholders Agreement, including TPR, contracted to avoid.

VI. THE COMPLAINT FAILS TO STATE A CLAIM FOR CONTRIBUTION

The Trump Brief established that the TPR Group have no basis for a claim of contribution against the Trump Group and Trans-Resources. (Trump Br. at 27-28). Arie and Orly settled with the Trump Group and Trans-Resources in June 2013. (*Id.* at 27). In connection with that settlement, on July 1, 2013, the Court entered the Second Amended Stipulation of Discontinuance with Prejudice. (*Id.* at 27-28). The Second Amended Stipulation of Discontinuance constitutes a release of all claims between the settling parties within the meaning of *General Obligations Law* § 15-108. (*Id.* at 28).

Nevertheless, the members of the TPR Group argue that they remain entitled to contribution for a subset of claims brought by Arie and Orly prior to the settlement against Trans-Resources and the Trump Group, and for unjust enrichment claims against TPR and Sagi. (*See* Opp'n Br. at 28). They are wrong. N.Y. Gen. Oblig. § 15-108(b) relieves an alleged tortfeasor "from liability to any other person for contribution as provided in article fourteen of the civil practice law and rules" when such alleged tortfeasor has settled with any injured parties. (*See also* Trump Br. at 28-29). In the face of this provision, the TPR Group attempt to argue that "[t]he 'unjust enrichment' [claim that] Arie and Orly were asserting against [Trans-Resources] and the Trump Group" was separate from the "surviving 'unjust enrichment' claim." (Opp'n Br. at 29). In actuality, there was ***only one count of unjust enrichment*** brought by Arie and Orly against the Trump Group, Trans-Resources and members of the TPR Group. *See* Third Amended and Supplemental Complaint, *Genger v. Genger*, Index No. 651089/2010 (N.Y. Sup. Ct. Sept. 20, 2011) [D.I. 112].

The TPR Group also argue that they remain entitled to contribution for certain claims brought against TPR and Sagi. Despite failing to cite any binding agreement or decision, the TPR Group suggest for the first time that the confidential settlement agreement ***might*** only dismiss Orly's individual claims against the Trump Group, but not resolve the Orly Trust's claims

against the Trump Group and the TPR Group. (Opp'n Br. at 28). These allegations fail because they were not alleged in the Complaint. *See Mayer v. Sanders*, 695 N.Y.S.2d 593, 595 (2d Dep't 1999) (dismissing because there were no factual allegations in the complaint sufficient to state a cause of action for indemnification and contribution); *see also supra.*

Moreover, the argument is counterfactual. This Court has already held that certain of Orly's claims in this action, including the remaining claims, are derivative in nature, and may be maintained by Orly on behalf of the Orly Genger 1993 Trust. *See Genger v. Genger*, 966 N.Y.S.2d 346, 2013 WL 221485, at *6 (N.Y. Sup. Ct. Jan. 3, 2013) (TABLE) (citing *Genger v. Genger,* No. 109749/2009 (N.Y. Sup. Ct. June 28, 2010)). In settling the claims among them, the Trump Group, Trans-Resources, Orly and Arie agreed to the dismissal of all claims presently pending against one another. This agreement is memorialized in the Second Amended Stipulation of Discontinuance. Accordingly, under N.Y. Gen. Oblig. § 15-108(b), the Trump Group and Trans-Resources have no liability to the TPR Group for contribution.

VII. THE COMPLAINT FAILS TO STATE A CLAIM FOR INDEMNIFICATION.

Although the TPR Group seek implied indemnification from the Trump Group and Trans-Resources for claims brought against the TPR Group by Arie and Orly, dismissal is required because the Complaint fails to state a claim for common law indemnification. (*See* Trump Br. at 27-30).

A cause of action for implied indemnification requires either (a) a showing that plaintiff and defendant owed a duty to third parties, and that plaintiff discharged the duty which, as between plaintiff and defendant, should have been discharged by defendant, or (b) vicarious liability without actual fault on the part of plaintiff (the proposed indemnitee). (Trump Br. at 28). This Court has already held that a party who has actually participated to some degree in the wrongdoing cannot receive the benefit of the implied indemnification doctrine. (*See id.* at 29).

The only remaining claims against TPR and Sagi are claims for breach of fiduciary duty (against only Sagi), and unjust enrichment (against both Sagi personally and TPR) for taking the proceeds of TPR's sale of those Trans-Resources shares that were purportedly transferred to the Orly Trust and to Arie.[8] These were acts in which the TPR Group actively participated (and the TPR Group do not suggest otherwise), and in which neither the Trump Group nor Trans-Resources had any involvement other than being the source of the sale proceeds. As a consequence, and as further detailed in the Trump Brief (*see* Trump Br. at 29), the TPR Group are not entitled to benefit under the implied indemnification doctrine, and the claims for such should be dismissed.

Additionally, the TPR Group's claim should be dismissed because the Complaint fails to allege that (i) the TPR Group together with any member of the Trump Group or Trans-Resources collectively owed a duty to Arie and Orly that was breached, or (ii) even if such a duty existed, the TPR Group discharged such duty even though, as between the TPR Group, on the one hand, and the Trump Group and Trans-Resources, on the other hand, that duty should have been discharged by the Trump Group and Trans-Resources. (Trump Br. at 29). Nor could it, as the Trump Group, including Trans-Resources, had no say in, or any knowledge of, how the proceeds received by TPR for the sale of Trans-Resources shares was to be divided among the feuding members of the Genger family. Rather, the TPR Group offers only the conclusory allegation that "[t]o the extent [the TPR Group] incur liability on [Arie's and Orly's] surviving claims, the Trump Group and [Trans-Resources] should indemnify [the TPR Group]. . . ." (Compl. ¶ 95), which is insufficient to maintain a claim for implied indemnification. (Trump Br. at 29).

[8] The Court already dismissed all of Arie's and Orly's claims against the Sagi Trust. *See Genger v. Genger*, 2013 WL 221485, at *21.

In an ill-conceived effort to cure its legal and pleading insufficiencies, the TPR Group attempt to gap-fill the Complaint's deficits by providing an addendum, couched as its opposition brief, replete with facts and allegations not supported by the Complaint or reality.[9] For instance, in response to the Trump Group's argument that the TPR Group failed to plead a duty (Trump Br. at 29-30), the TPR Group now argue that:

> TPR and Sagi are being sued for one and only one thing – their decision to settle the Trump Group's lawsuit by agreeing to the August 22, 2008 Stock Purchase Agreement and Side Letter Agreement. . . . [S]ettlement was needed because: (a) TRI "reneged" on the Funding Agreement; and (b) the Trump Group then "retaliated" against TRI's management, in particular Arie, by filing suit against TPR to undo the 2004 sale of the Sagi Trust Shares to the Sagi Trust. In other words, Cross-Claimants are being sued because, through no fault of their own, they were caught in the cross-fire between TRI and the Trump Group, and settled. Either TRI was right to renege, or the Trump Group was right to retaliate. But either way, one of them breached a duty which it would be inequitable to shift unto either TPR or Sagi.

(Opp'n Br. at 29-30) (citations omitted). None of this can be found in the Complaint. But in any case, this statement – like the Complaint – fails to allege any vicarious liability or collective duty owed by both the TPR Group and the Trump Group but discharged by members of the TPR Group. Even if it did, the statement once again ignores the fundamental notions that it was TPR's (and its President, Sagi's) conscious decisions to (i) settle the litigation with the Trump Group by selling one block of its Trans-Resources stock for a price that they explicitly acknowledged was "fair, reasonable and acceptable to each" of TPR and Sagi Genger, and (ii) sell the other two blocks of its Trans-Resources stock to which Arie and the Orly Trust laid claim. Of course, TPR (and Sagi, its president) had other options at the time, including defending the law-

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[9] The TPR Group cite the dissent in *Rosado v. Proctor & Schwartz, Inc.*, 483 N.Y.S.2d 271, 279 (1st Dep't 1984), claiming it was affirmed. (Opp'n Br. at 29). What the Court of Appeals in *Rosado* actually affirmed was a finding that no implied indemnification existed because the damages that the third party plaintiff was "compelled to pay stems from its own wrong and there is not unjust enrichment on [the third party defendants'] part." *Rosado v. Proctor & Schwartz, Inc.*, 66 N.Y.2d 21, 27 (N.Y. 1985). A similar result would be warranted here if the TPR Group is found liable to Arie and/or Orly based upon the TPR Group's own wrongdoing.

suit brought by the Trump Group using the same theories the TPR Group take here (*i.e.*, that 2004 Transfers were valid because Arie, but not TPR, failed to give notice, or that the Sagi Trust validly owned the shares). Instead, TPR gladly elected to take the offer on the table and lead the Trump Group to believe that the TPR Group were more than satisfied, and that the Trump Group were now insulated by at least one faction of the Genger family from any further involvement in that family's ongoing feud. Having chosen their path, TPR and Sagi – and they alone – should be required to bear the burden of their misconduct.[10]

VIII. THE TPR GROUP'S CLAIMS ARE TIME-BARRED.

A. Both Tortious Interference Claims Are Barred By The Statute Of Limitations

In the Trump Brief, the Trump Group established that the Sixth Counterclaim and Seventh Counterclaim – for tortious interference with the Transfer Agreement and for tortious interference with business relations, respectively – should be dismissed due to the applicable limitations periods. (Trump Br. at 23 n.22 & 25 n.24). Specifically, the Sixth Counterclaim, brought in 2013, but which is alleged to have occurred in 2008, should be dismissed because it is subject to a three-year statute of limitations. *See Buller v. Giorno*, 868 N.Y.S.2d 639 (1st Dep't 2008) (affirming dismissal of claim for tortious interference of contract due to the expiration of the statute of limitations). Likewise, the Seventh Counterclaim – a tort claim – brought in 2013 but alleged to have occurred in 2008, is barred by a three-year statute of limitations and should be dismissed. *See Susman v. Commerzbank Capital Mkts. Corp.*, 945 N.Y.S.2d 5, 7-8 (1st Dep't 2012). In its opposition, the TPR Group does not appear to contest that these limitations periods

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[10] *In re T.J. Ronan Paint Corp.*, 469 N.Y.S.2d 931, 936 (1st Dep't 1984), cited by the TPR Group, does not address indemnification of any kind, let alone implied indemnification of the kind the TPR Group seeks in the Complaint. Rather, that case stands for the unremarkable proposition that the relationship among stockholders in a "close corporation" is akin to that of partners. As noted above, Trans-Resources, a Delaware entity, is not a "close corporation" under Delaware law. Even if it were, the TPR Group's argument does not explain (a) how such a relationship constitutes the vicarious relationship required for implied indemnification or (b) how TPR or Sagi discharged a duty that should have been discharged by the Trump Group.

are applicable.[11] Thus, in addition to the reasons set forth above and in the Trump Brief, the Sixth and Seventh Counterclaims also should be dismissed as time-barred.

B. The Fraud Claims And The Breach Of Contract Claims Are Barred By The Statute Of Limitations

The TPR Group devote their focus upon the Trump Group's argument that CPLR 213(8) requires claims of fraud to be commenced no more than six years from the date the claim accrued or two years from the time the fraud was discovered. (Opp'n Br. at 13-15). In the Trump Brief, the Trump Group argued that the First Counterclaim (filed in April 2013) is time-barred and should be dismissed because any representation (and the only representation alleged in the Complaint is Arie's statement in the MSA) about TPR's ability to convey its Trans-Resources shares was made more than six years ago (in 2004) and was discovered more than two years ago (in 2008) by the TPR Group when TPR sold its Trans-Resources shares to the Trump Entities. (Trump Br. at 13).

In response, the TPR Group argue that the First Counterclaim: (i) at a minimum, relates back to Arie's Second Amended and Supplemental Complaint (the "Arie Complaint"), which was filed on September 22, 2010 (*see* Opp'n Br. at 13-14); (ii) did not accrue until August 2008, "when the Trump Group exercised their Purchase Rights under the Stockholders Agreement" (*see* Opp'n Br. at 14); or (iii) accrued, on some equitable basis, in 2011-12, when the TPR Group claim to have "realize[d] the full scope of the wrongful scheme against them" because, among other reasons, their discovery was somehow impeded due to Arie's spoliation efforts (*see* Opp'n Br. at 15). These arguments miss their mark.

First, the alleged basis for the First Counterclaim is Arie's representation in the MSA regarding TPR's ability to transfer its Trans-Resources shares – a representation made in 2004

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[11] The TPR Group glibly lump all of their claims together in defining them as the "Cross Claims." (Opp'n Br. at 1). Each of their claims, however, must be reviewed to determine whether they are barred by the applicable stat- *(cont'd)*

(more than six years ago) that was discovered by the TPR Group in 2008 (more than two years ago) when TPR and the Sagi Trust negotiated the Stockholders Agreement with the Trump Entities. (Trump Br. at 13). Thus, even if the First Counterclaim relates back to the Arie Complaint (and it does not), the alleged conduct occurred outside time frames permitted by CPLR 213(8).

Second, the Trump Group are aware of no authority – and the TPR Group cite none – for the proposition posited by the TPR Group that a statute of limitations is tolled until a plaintiff completely discovers the "full scope" of an alleged wrong. Rather, established New York law stands completely to the contrary. *See Watts v. Exxon Corp.*, 594 N.Y.S.2d 443, 444 (3d Dep't 1993) ("[H]aving positive knowledge of fraud is not required to commence the running of the two-year Statute of Limitations. In order to start the limitations period regarding discovery, a plaintiff need only be aware of enough operative facts 'so that, with reasonable diligence, she could have discovered the fraud. . . .' In other words, all that is necessary are sufficient facts to suggest to a person of ordinary intelligence the probability that they may have been defrauded. . . .") (citations omitted); *see also Aldrich v. Marsh & McLennan Cos., Inc.*, 861 N.Y.S.2d 30, 31 (1st Dep't 2008) (merely requiring notice and ability with reasonable diligence to discover an alleged fraud, and holding that inquiry notice of a fraud may be supported by information in the public domain); *cf.* CPLR 213(8) (incorporating reasonable diligence standard).[12]

Similarly, the Trump Group established in the Trump Brief that the Third Counterclaim for breach of the Stockholders Agreement was time-barred because the alleged breach occurred in 2004, more than six years prior to the commencement of TPR's claim. (*See* Trump Br. at

(cont'd from previous page)
ute of limitations. Any argument lumping them together should be rejected out of hand.

[12] Arie's deletion of certain documents is irrelevant to the analysis and does not create a basis for some sort of equitable tolling, as the TPR Group suggest. This is particularly the case where the members of the TPR Group had knowledge that Arie's representation was false.

18). In its opposition, the TPR Group merely recycle their same arguments made with respect to the First Counterclaim. (Opp'n Br. at 14-15). These arguments fail for the reasons noted above.

The TPR Group also argue that their breach of contract claim did not accrue until the Trump Group "exercised their Purchase Rights" under the Stockholders Agreement. (Opp'n Br. at 14). Even assuming the TPR Group are not factually mistaken, their argument is wrong as a matter of law. *See, e.g., St. George Hotel Assocs. v. Shurkin*, 786 N.Y.S.2d 56, 57 (2d Dep't 2004) (rejecting argument that cause of action accrues when damages are allegedly sustained, and holding that the cause of action accrued and began to run "upon the breach"). Such a claim accrues at the time of breach, *see id.*, here, in 2004 when TPR improperly transferred the shares.[13]

For the foregoing reasons, and the reasons discussed in the Trump Brief, the TPR Group's claims should be dismissed.

IX. THE TPR GROUP SHOULD NOT BE GRANTED LEAVE TO REPLEAD.

The TPR Group's request to re-plead should be seen for what it is: a further attempt to keep litigating baseless claims. "[L]eave to amend a pleading should not be granted where the proposed amendment is 'palpably insufficient'. . . ." *Freeman v. City of N.Y.*, 975 N.Y.S.2d 141, 144 (2d Dep't 2013) (citations omitted). Moreover, the Court may not grant leave to amend where the proposed amendment lacks merit, including to the extent it is shown that a party possesses no cause of action. *See Oneida Indian Nation v. Hunt Constr. Grp., Inc.*, 970 N.Y.S.2d 156, 157 (4th Dep't 2013) ("We agree with plaintiff that Supreme Court erred in granting the motion inasmuch as it is well settled that such leave 'should not be granted where, as here, the proposed amendment lacks merit. . . .'") (citations omitted). For the reasons set forth herein and

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[13] The TPR Group rely on *Brooklyn Union Gas Co. v. Interboro Surface Co., Inc.*, 449 N.Y.S.2d 274, 275 (2d Dep't 1982) in aid of their argument that their alleged harm accrued after August 8, 2008, when the Trump Group invoked their Purchase Rights. The Second Department, however, has subsequently held, that *Brooklyn Union Gas Co.* "should not be followed. . . ." *St. George Hotel Assocs.*, 786 N.Y.S.2d at 57 (citations omitted).

in the Trump Brief, there is no merit to the causes of action alleged in the TPR Group's Complaint and any proposed amendment of their claims against the Trump Group would be "palpably insufficient." Accordingly, the Court should deny any request for leave to amend the Complaint.[14]

CONCLUSION

For the reasons set forth above as well as those set forth in their Trump Brief, Trans-Resources and the Trump Group respectfully request that the Court dismiss the Complaint, including the First, Second, Third, Sixth, Seventh and Tenth Counterclaims against them, with prejudice and grant such other relief as is just and proper.

Dated: New York, New York
April 17, 2014

Respectfully submitted,

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[14] The TPR Group cite *Cerra v. Scher Fabrics, Inc.*, 748 N.Y.S.2d 483 (1st Dep't 2002), for the proposition that the TPR Group may be granted leave to amend. (Opp'n Br. at 30). However, unlike here, the *Cerra* court did not face a situation in which the plaintiff's claims were completely devoid of any merit.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: **PART: 12**

----------X

ARIE GENGER and ORLY GENGER, in her individual capacity and on behalf of THE ORLY GENGER 1993 TRUST,

Plaintiff(s),

-against-

INDEX NO. 651089/10

SAGI GENGER, TPR INVESTMENT ASSOCIATES, INC., DALIA GENGER, THE SAGI GENGER 1993 TRUST, ROCHELLE FANG, individually and as trustee of THE SAGI GENGER 1993 TRUST, GLENCLOVA INVESTMENT COMPANY, TR INVESTORS, LLC., NEW TR EQUITY I, LLC, NEW TR EQUITY II, LLC, JULES TRUMP, EDDIE TRUMP and MARK HIRSCH,

Defendant(s).

----------X

SAGI GENGER, individually and as assignee of THE SAGI GENGER 1993 TRUST, and TPR INVESTMENT ASSOCIATES, INC.,

Cross-Claimants, Counterclaimants and Third-Party Claimants,

-against-

ARIE GENGER, ORLY GENGER, GLENCOVA INVESTMENT COMPANY, TR INVESTORS, LLC, NEW TR EQUITY I, LLC, NEW TR EQUITY II, LLC., JULES TRUMP, EDDIE TRUMP, MARK HIRSCH, TRANS-RESOURCES, INC., WILLIAM DOWD, and THE ORLY GENGER 1993 TRUST,

Cross-Claim, Counterclaim and/or Third-Party Defendants.

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80 Centre Street
New York, New York 10007
March 25, 2015

B E F O R E:

THE HONORABLE BARBARA JAFFE,

J U S T I C E

Eric Allen
Official Court Reporter

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THE COURT: So, this is your motion, Ms. Bachman.

MS. BACHMAN: It is, your Honor.

Good morning.

THE COURT: Good morning.

MS. BACHMAN: So, this motion has been pending for a long time, so I want to make sure that the Court is aware of sort of the context in which our --

THE COURT: What happened in surrogates? Nothing yet from --

MS. BACHMAN: It has not -- Dalia is still the trustee. The court has required further proceedings with regard to making sure that the Sagi Trust is included in the matter, so it remains at the status quo that Dalia is still the trustee.

THE COURT: Do you know when -- is there any clue as to when that case is going to be decided?

MS. BACHMAN: I do not know, your Honor.

MR. GRIVER: Your Honor, the only relevant happening, I think, in the case, is that the surrogate court appointed a guardian for the children who are the remainder -- continuing remainderment for the Sagi trust and he filed, I believe last week, position papers saying that he agrees with our position that Dalia should be removed as trustee and that she has

violated her obligations.

THE COURT: Okay, but that's not part of the record before me right now.

MR. GRIVER: That is -- no. The remainderment for the -- excuse me. The remainderment for the Orly Trust.

THE COURT: Yes. That I understand.

MR. GRIVER: We can certainly file it with the Court. We think it is a subsequent document that has relevancy to these proceedings if your Honor thinks so.

MS. BACHMAN: And, obviously, that issue hasn't been adjudicated and, as the Court noted, is not part of the record.

So, with that caveat in mind, I think it is important to understand the context of what's happened here.

When we brought this motion, I think, back in August of last year, we had not yet seen the settlement agreement and the Federal Court had not yet opined on the effect that they believed that the settlement agreement had on what Orly gained from the Orly trust shares. So, as part of this motion, I have included Judge Keenan's two decisions which opine and conclude that the settlement agreement is a monetization of Orly's -- the Orly Trust shares. Essentially, she

traded the trust shares as part of the settlement and acknowledged that the Trump Group is the owner --

THE COURT: Was it in Keenan's decision or was it Forest's?

MS. BACHMAN: I apologize, thank you. Yes, Forest. I could tell by your face that I had gone astray, so I appreciate it.

Judge Keenan's decision --

THE COURT: No, Judge Forest.

MS. BACHMAN: Sorry, Judge Forest's decision. Delete Keenan from the record.

So, based on that decision, it is now our understanding with that decision that the settlement agreement was basically the exchange: The Orly Trust interest in the shares for a whole bunch of money.

The Trump Group had been consistent before this Court in acknowledging that they viewed the settlement as the settlement of the interest of the Orly Trust shares and that it was an exchange of money for those shares. They effectuated that and acknowledged that by encouraging and asking the Delaware chancery court to dismiss and acknowledge that the shares now belonged to the Trumps.

Orly's attorneys have taken somewhat interesting turns along the way. Before this Court, when this

Court was hearing the issue of whether it should so order the settlement, Mr. Griver, I believe, argued that, no, we are not settling the trust claims and, in fact, quote, "Dalia can pick up the cudgel."

The Court said in it's decision, look, I can't tell whether the trust shares -- whether the trust claims are dismissed or not as part of the settlement and until I get clarification, you accurately stated, I believe, I cannot tell who the settlement proceeds belonged to. I can't tell whether they belong to the trust or to Orly individually. So, the Court invited the parties to clarify who they viewed as the settling parties and whether the trust had dismissed its claims or not.

None of the settling parties acceded to the Court's invitation and with that ambiguity, we were left to protect the interests of the trust. We brought this motion seeking first for Dalia to be substituted in if claims remained since Orly has stepped back and said that she is no longer prosecuting the case as a derivative plaintiff. And under well-settled New York law, if a derivative plaintiff is no longer prosecuting the action on behalf of the principal, then it is appropriate for a party to be substituted who has an actual interest in protecting that principal. That

would be, obviously, the trustee of the trust.

Likewise, as a second branch and perhaps now more importantly, we simultaneously moved for the settlement proceeds to be paid into court pending an allocation and determination of who that money belongs to and that's why we are before you today.

We now have seen the settlement agreement and it seems to confirm and be consistent with the Trump Group's position that they intended to and did settle all of the claims including, most importantly, the trust claims and at the end of the day that's what they bought and paid for: The trust shares. And if they bought and paid for the trust shares, the money belongs to the trust.

Thank you.

MR. ALLINGHAM: Your Honor, I don't know who should speak next, but I think it would be helpful I should speak next to make clear submissions.

MR. GRIVER: No objection.

MR. ALLINGHAM: Tom Allingham for the Trump Group.

The settlement agreement settles claims. It doesn't buy shares. The shares had already been purchased as the Delaware court has found, pursuant to an agreement that was entered into back in 2008 and the

closing on those shares was 2012 or '13, '11, whenever. Those shares had been purchased a long time ago. There remained claims of the Orly trust against the Trump Group and that's what was settled in the settlement agreement. We paid money for a release of claims that Arie, Orly and the Orly Trust had against the Trump Group and that's what we paid the money for, so that's point number 1.

Point number 2: I think this is an unusual situation, at least in my experience. The moving party now agrees with the position that we've taken since the settlement agreement was entered into in June of 2013 that among the claims that we purchased a release of, among the claims that we settled were the claims of the Orly Trust and so the relief that is sought -- there were two forms of relief sought in the motion, as Ms. Bachman said. One was, "I want to intervene to pursue these claims." That form of relief we oppose. Because those claims have now, as conceded, I think, by everybody -- everybody agrees that they were released, there are no claims currently pending and, in fact, there are no claims that could be pending into which Dalia could intervene. So, the motion --

THE COURT: There is nothing to --

MR. ALLINGHAM: Correct. There is nothing

there, nothing to intervene in, so the motion to intervene should be denied.

THE COURT: It's a motion to be substituted.

MR. ALLINGHAM: To be substituted. I think of it as an intervention motion, but, yes, your Honor.

And I don't think that if you look at the papers, anybody really disputes that. In Dalia's brief, she says it has now been definitively revealed that Orly settled the Orly Trust's claims against the Trump Group. In the Sagi submission, not a brief but an affirmation from Mr. DellaPortas, it's the same thing: "Having finally seen the settlement agreement, it is eminently clear that there is no cudgel for Dalia to pick up. The claims" -- and these are the claims of the Orly Trust -- "were released, as Mr. Allingham had correctly told the Court in his June 2013 letter."

So, where does that leave us? That leaves us with the second form of relief, which is should any form of relief be entered against the settlement proceeds that have either -- that have either been paid or may in the future be paid pursuant to the settlement agreement.

With respect to the 18 or so million dollars -- I think it's actually 17 and a quarter million dollars, but the money that's already been paid in cash, we

don't have it. We have no claim to it. We take no position on that money. The Court may or may not have jurisdiction to enter relief against whoever has got that money, but we don't know who it is. We know who we paid it to, but we don't know who has the money now.

With respect to the remaining settlement proceeds that may be paid in the future, that is in the form of two notes; each in the principal amount of 7 and a half million dollars.

There are a number of conditions that may affect the maturity date of those notes. They have a nominal maturity date of June of 2016 and June of 2017, but they could be accelerated or extended.

Also, we have a contractual right to set off any unpaid indemnification amounts under the settlement agreement. In the settlement agreement, we paid not only for releases from Arie, Orly and the Orly Trust, but we also paid -- so that's peace from those three parties -- but we also paid for an indemnification from Arie, Orly and the Orly Trust against any defense costs, settlement payments or judgments in a broad array of actions that could be brought by any Genger family member. So although we couldn't buy complete peace, we tried to buy an insurance policy against the peace that remained out there.

So, we have a setoff right against -- we have a contractual obligation to pay on those notes. When that will come due is determined by a lot of factors. When they come due, we have a contractual right of setoff against the $15 million face amount of those notes.

And so, with respect to the future payments, what I would say is this: No payment is due now, so I think any relief on the future payment would be premature.

To the extent any relief were to be entered now as to these future payments, it shouldn't be entered against the Trump Group which has a contractual obligation to pay the payee. It should either be entered in the nature of an in rem remedy against the notes themselves, deliver them to you or whatever, or it should be entered and directed at the payee that we're contractually obligated to pay, rather than to direct it to the Trump Group which would abrogate our contractual obligation to pay under the note.

So that's our position.

THE COURT: Thank you.

MR. ALLINGHAM: Thank you, your Honor?

THE COURT: Who is next? You don't have to stand, Mr. Griver.

MR. GRIVER: Thank you, your Honor. I am sometimes better when I stand.

A lot of times, this case has become somewhat surreal, but I think this motion takes the cake. There is a museum in Cairo, Egypt called the October War Museum that is dedicated to the proposition that Egypt won the 1973 Yom Kippur war. It looks like a museum. You go in, there are exhibits on the second floor, you can watch a film on the third floor. There is a diorama -- it's really nice. It is a moving diorama, 360 degrees, all dedicated to the idea that Egypt won that war; right? Only problem is it's not true.

So, you go to someone who is at the museum, you know, a guide and you say, well -- but Egypt lost the war. And he says, no, no, but look at that piece of paper, look at that newspaper article where it says it won. Look at this piece of shrapnel. Look at this tank we captured from the Israelis; all of this proves that we won; right? And you can buy T-shirts and everything and it looks real until you really look at it and you realize that they are only talking about the first day of the war and they completely ignore 99 percent of what happened; okay?

Mr. Allingham gets up here and says, oh, well, we settled with the Trump -- we settled with the Orly

Trust; right? Well, you know what? You have to look at the language of the CSA because the Orly Trust is expressly excluded from the settling parties. Mr. Allingham tried to get the trust claims included and the Orly Trust included --

THE COURT: Which Orly entities settled? There is three in all, I take it?

MR. GRIVER: No. There is the AG Group settled so the Brosers settled, Arie settled --

THE COURT: I don't consider them -- the Orly people are Orly individually, Orly as beneficiary of the trust and the Orly Trust; is that right?

MR. GRIVER: Orly settled and it says it right there: Orly Genger in her individual capacity and in her capacity as beneficiary of the Orly Genger 1993 trust.

THE COURT: And as beneficiary.

MR. GRIVER: And as beneficiary.

But the Orly Trust itself is expressly excluded from the A.G. Group settling parties and is expressly defined as a member of the nonsettling Sagi Group.

THE COURT: Is that your understanding, Mr. Allingham?

MR. GRIVER: That is Page 3, by the way.

MR. ALLINGHAM: It is, your Honor. That is the

way the agreement reads.

When Justice Feinman in --

THE COURT: That's the end of it. So the Orly Trust is not settled.

MR. GRIVER: That is the language that he signed in exchange.

MR. ALLINGHAM: It's more complex than that.

MR. GRIVER: You know what else is in that? Any changes to that have to be in writing, agreed to by all the parties, and we don't agree and there is no writing. He is talking about what he wanted and there is also a -- where everything, all prior agreements, et cetera, are merged. There is a merger clause in there, as well.

THE COURT: Oh, no, do I perceive another action or motion?

MR. GRIVER: No, I don't believe so, your Honor, because here's what also happened. There was a second amended stipulation of dismissal where we crossed out, by hand, because it was mistakenly put in -- crossed out by hand and your Honor was concerned about it and that's why it became the second amended stipulation of dismissal because that language was taken out. And the language that was taken out was any idea that the Orly Trust settled the claims as part of that confidential

settlement agreement, the Orly Trust was removed and, indeed, the Orly Trust remained -- the claims of the Orly Trust remained, specifically in that second amended stipulation of dismissal, which allowed the two injunctions -- the injunctions against the Trump Group and the injunctions against everybody else, including Dalia Genger -- to pursue her claims in Delaware --

THE COURT: So you agree with Ms. Bachman on that; that the Orly Trust claims remain and --

MR. GRIVER: The Orly Trust claims remain --

THE COURT: So the only issue remains, of course, whether Dalia should be substituted, which I take it -- but you say the trust claims remained -- does everybody agree?

MR. GRIVER: No, it remained. The second amended stipulation of dismissal, which dismissed Orly's claims as an individual and as a beneficiary is what happened in this court. As part of that stipulation, the claims of the Orly Trust were not settled -- were not dismissed and Ms. Bachman and Dalia were permitted to reinvigorate a lawsuit in Delaware that they had commenced claiming the right to the shares and go moving against the Trump Group and TPR, et cetera; right?

We had gotten those stayed previously because

our concern was that Dalia would not vigorously pursue those claims on behalf of the Orly Trust.

Dalia went down to Delaware, immediately settled with TPR and with the Trump Group. Now, if her claims had already been settled two months before, then what was she doing down in Delaware? But she went down to Delaware. She didn't come in at the time and say, hey, wait a second, wait a second, I want my moneys. No. She went down to Delaware, settled with everybody else, TPR and the Trump Group, and it was that settlement that caused the 1st Department to dismiss the claims here because they said there is nothing left because of the Delaware stipulation.

So, Dalia has already taken care of it and because of that there are no claims left. The Court of Appeals has so ruled, the 1st Department has so ruled that the fact that we are here arguing about her attempt to substitute herself in when she settled already as a trustee -- she gets one chance to settle. We gave you the Delaware stipulation. That's what she says. She makes findings of fact that are -- that help Sagi. She makes statements that help Sagi and then finally she settles all of her claims on behalf of the trust claiming to properly represent the trust.

Now, that's something that we are going to raise

up in the surrogate's court. That is another example of Dalia misusing her power as trustee, but that has no bearing on this. There are no claims left because the Orly trust settled her claims in Delaware and Orly individually and as beneficiary settled the claims with the Trumps in the confidential settlement agreement.

The money that they are trying to get now is above the $10 million that the Delaware settlement caused to be given to TPR and that's the Keenan decision. The Keenan decision was, well, now that the Delaware stipulation exists and the Orly Trust is decided, that everything's okay with the Orly Trust, well, then the sale of the shares back in 2008, the proceeds go to TPR. It's in our papers.

THE COURT: I am shaking my head nodding just to the extent that I understand what you are saying.

MR. GRIVER: Right, okay.

Very simply, Orly settled with the Trumps in June. The Orly Trust settled with the Trumps in August, two months later.

Now, we go to -- and the main point, your Honor is there are no claims left and since there are no claims left, her substitution motion just fails. It's that simple.

Then we go to the second part of her claim,

which is CPLR 2701. She wants the proceeds of Orly's settlement with the Trumps to be paid into court and she just can't do that. Most attorneys, I think, would simply read the language of the statute to determine that the language of the statute bars their ability to bring a motion and stop right there, but that's not what happened here. What happened here is that they proceeded nonetheless. And the motion to have the proceeds paid in court doesn't work because under CPLR 2701, that CPLR provision, your Honor, is designed very narrowly to take care and protect moneys that are the subject of an action. And there are three sub parts.

First of all, it has to be the subject of an action. The moneys that are the settlement with the A.G. Group but not the Orly Trust are not part of the 2010 case which, in any event, no longer exists.

But you can go and look at each one of the individual subparagraphs and see that it doesn't work.

The fourth one is if a third party is a trustee and is holding the money, like the comptroller of the -- the State comptroller. The State comptroller has, let's say, death benefits. The person has died. It is claimed both by the beneficiary of the will and by the ex-wife who is named in the policy for the death benefits. They are fighting over that specific sum of

money and the comptroller has to pay it to somebody so he pays it into court on a monthly basis until the court rules does widow A get it or widow B get it. That's clearly not the situation here.

The second one is where there are special circumstances that make it desirable that payment be made to -- that payment be made into the court instead of two the parties. Well, as Mr. Allingham correctly noted, some of the money has already been paid, some of the money will be paid and there are no special circumstances here that should delay any of that. There is no evidence that they have come in that said that there is a special circumstance that requires the court to protect the moneys. There is not even a claim against those moneys in a court of law.

Third is the situation where ownership of the property will depend on the outcome of the pending action. That also is inapplicable here. There is no pending action, number one. And, number two, even if there was, you can look at all the counterclaims, all of the cross-claims, all of the original claims, none of it has to do with the confidential settlement agreement so it simply does not apply.

And it can't serve as a legal basis for what Dalia is attempting to do. She made her own decision

to settle and she settled it as she saw fit; in a way that was destructive to Orly and we'll take care of that later, but in a way that she decided to settle those claims. There is a stipulation in Delaware and they ignore that. They ignore the second amended stipulation of dismissal in this court and what happened -- the fact that they went ahead and then used that stipulation to say, oh, there are still claims for Orly Trust. Now they are claiming that the Orly Trust claims didn't even exist at the time that they went into Delaware and how is that possible? And Mr. Allingham chooses to ignore the actual language of the confidential settlement agreement which he cannot do because he negotiated that language, he chose to have his client sign that language and for him to come in and say well let me explain to you how the language should be ignored is improper, entirely so.

So, I am going to sit down and say nothing else. Thank you.

MR. MONTCLARE: Thank you, your Honor. Paul Montclare for Arie Genger.

I have just a few things to say. I have to say I agree with everything that Mr. Griver said. It's not to have him back in the courtroom.

It seems to me that we can address this really

pretty simply. There is no action for her to substitute into. I mean, how can you substitute into an action that's been completely dismissed, has been completely affirmed, there is now no leave-to-appeal motion pending to the Court of Appeals. She is going to be substituted in for Orly who lost the case against the Trumps who are no longer in the case. I mean, that should end the whole analysis. I don't understand why we need to go past that.

The issue with respect to the confidential settlement agreement, on behalf of Arie Genger, we were a party to that agreement and they want to come in and interfere with our property rights by just saying, oh, we want it paid into court. What action is there to deprive us of our property rights being brought by --

THE COURT: Well, I think what Mr. Griver mentioned in his list of subdivisions of 2701, the only one that piqued any interest was special circumstances, so what about that?

MR. MONTCLARE: But there are no -- there has to be an existing action, your Honor. There is no existing action.

THE COURT: So that -- you still need an existing action for there to be special circumstances.

MR. MONTCLARE: Yes. Otherwise what do we just

have people walking in off the street and into court and asking for an application to pay it into court?

THE COURT: It happens all the time.

MR. MONTCLARE: They could have early on tried to get an attachment of that. They could have done a lot of things but the procedural mechanism they have chosen is a little unusual.

But it's not grounded in anything. I think -- and also, it proceeds from a false assumption of what their -- what they conceded in Delaware, which I am not going to repeat; why we settled with Mr. Allingham's clients in Delaware at a time when there are open issues that made settlement possibility. Much to my great disappointment, that is no longer the case. That case is over against the Trumps. It's over.

And the reason she wants to substitute in is to basically to sue the Trumps. And that makes no sense at all to me.

THE COURT: Okay, thank you.

I think --

MR. DELLAPORTAS: Very briefly, your Honor.

Three quick points:

Number 1, Orly Genger brought claims in this case on behalf of the Orly Genger 1993 Trust.

Number 2, Orly Genger and her father got or are

going to get $32.3 million in settlement of those claims and, number 3, those claims are no more and we join in Ms. Genger's -- Mrs. Dalia Genger's position that the money should be paid into court.

Subject to that, we respectfully disagree with the comments of Mr. Montclare and Mr. Griver, except to the extent that Mr. Griver described the Cairo museum, which I have been to as well and I think it is an accurate description of it.

And with that, we rest on our papers.

THE COURT: Thank you.

MS. BACHMAN: May I add something, your Honor?

THE COURT: Sure.

MS. BACHMAN: With regard to, I think, the Court's very pointed question to Mr. Griver and Mr. Allingham, who were the settling parties? And I think the Court described, at least conceptually, three possibilities: Orly as beneficiary and Orly individually --

THE COURT: Those were settled.

MS. BACHMAN: Apparently. Apparently that's what Mr. Griver is saying.

THE COURT: Signed, sealed, delivered. You saw the agreement.

MS. BACHMAN: I have now seen the agreement.

The mystery party is what happened to the Orly Trust.

THE COURT: And that was in Delaware. Kaputski (phonetic) in Delaware; no?

MS. BACHMAN: As I understand it, this case was a derivative case presently pending today. That's what Orly described in her complaint, her claims to be. She is bringing this action, quote, "on behalf of the Orly Trust as beneficiary of the Orly Trust to protect her interest thereunder." Her claim, as I understand it -- and unfortunately you have had a longer tenure in this than I have -- but as I understand, it were purely derivative claims. I understand that she said in the caption Orly Genger individually and on behalf of the Orly Trust but the real claims were with regard to what was done with the Orly Trust shares. For them to say she settled as a beneficiary and somehow that's different than the trust is a distinction without a difference. If you are a beneficiary, you are, I believe, saying I have a derivative right to sue because the trust is not protecting my interest as the beneficiary.

I don't understand how you can split that difference and say, no, the beneficiary is something different than the trust. They have to be merged and

that's what she did in her complaint.

And the entire settlement agreement is replete with all of those references.

It says, in defining who the A.G. Group is, that Orly Trust, in quote, "all her capacities." It doesn't say in her individual capacity --

THE COURT: What about the second agreement? Are you focusing on the second?

MS. BACHMAN: I am looking at what I believe to be the actual -- the CSA.

THE COURT: The one where there is a writing, "I wrote in" or something.

MS. BACHMAN: Correct.

THE COURT: I'm on Page 1 of that.

MS. BACHMAN: I am actually looking at the settlement agreement itself, what she actually did. On Page 1 of that settlement agreement, it says -- it defines Orly as "Orly Genger in all capacities."

So, while they may be playing convenient word games here -- I hope they are not -- but the settlement agreement itself belies what I believe Mr. Griver is trying to convince this Court of; that somehow there is this distinction, this magical distinction that he is now conveniently drawing which they weren't drawing in the settlement agreement itself.

THE COURT: Even assuming you are right, which I am not sure you are, but assuming you are right, so what? If it was all settled, if two of the entities settled in one way or the other and then Dalia went down and settled with the Trump Group and TPR in Delaware, what's left and why is there something left? That's what I want to know.

MS. BACHMAN: At least as I understand the context of the Delaware settlement, it was motivated -- and if you look at the confidential settlement agreement, it calls for the settlement of that Delaware case. It says go settle that case. Orly --

THE COURT: It doesn't say go settle it. It says something else; right?

MR. MONTCLARE: Cooperate.

MR. GRIVER: Cooperate.

MS. BACHMAN: It says Orly will cause.

THE COURT: Cause.

MR. GRIVER: No, Orly will take efforts to cause.

THE COURT: Something like that. It's a little squishy.

MS. BACHMAN: A little squishy, but the concept is clearly there. If he wants to look at the words, which I think he had a part in drafting, that was idea.

The idea was we're buying peace, as Mr. Allingham said. We're doing the best we can. We don't want to hear from you again. Go away and make sure, as best you can, this all goes away.

THE COURT: So why is something left? That's what I don't understand.

MS. BACHMAN: A, it's unclear if something is left or not. But even if it's not, fine, they settled those cases. They settled those claims and they got paid for it. If she brought this case as a derivative plaintiff and she got paid for her derivative claims, it is black letter law that that money, those settlement proceeds on behalf of the derivative plaintiff go to the principal. They don't belong to the individual.

THE COURT: Aren't you too late?

MS. BACHMAN: How so?

THE COURT: It settled.

MS. BACHMAN: But the payment hasn't been made yet.

THE COURT: I don't know. It sounded like it was. And does it matter? Does it matter that it hasn't been paid? Even if it hasn't been, the agreement has been entered, it's -- is there a judgment or something?

MR. ALLINGHAM: Your Honor entered a stipulation of dismissal and we have paid $17.25 million plus interest and we are obligated on two more notes.

THE COURT: As he said, it sounds like that ship has sailed.

MS. BACHMAN: There is $15 million that they owe to the settling parties. If you want to call that spare change, I will take that change. That's fine.

Mr. Griver talked about the fact that these -- the cases that I cited talk about a future stream of payment; right? He is talking about widows and orphans getting paid in the future. That is, by definition, what this is. We are talking about a future stream of payment for claims that were settled. Yes, the claims were settled. Mr. Allingham said repeatedly that he bought peace. The Orly Trust settled its claims under the settlement agreement. Otherwise, if -- as I understand the Court's concern, if they settled the claims, took all the money and we were not a party to it, then they shouldn't have been in power to settle in the first place. They can't have it both ways. They can't settle the claims and take the money and then say it's too late. Either they settled the derivative claims and money belongs to the trust or they didn't settle the claims and those claims are out there and we

have the right to pursue them.

THE COURT: I'll read your papers because I am not quite sure I get it.

MR. GRIVER: Your Honor, just very quickly. Notice that she talks about the complaint. She does not talk about what happened in the settlement and she misquotes the CSA. The CSA is executed by the A.G. Group and the Trump Group. That's on Page 1.

Two defined groups: The A.G. group is specifically defined to be Orly Genger in her individual capacity and in her capacity as beneficiary of the Orly Genger 1993 trust. The Orly Trust is expressly excluded and on Page 3 is included with a group called the Sagi Group which identifies the nonsettling parties. It's very simple. There is an entire agreement clause. We have to amend it only by a writing signed by all of the parties, so that language is what controls; not the complaint but the language of the settlement.

The second amended stipulation of dismissal, Ms. Bachman wasn't here jumping up and down and saying, hey, I have to be part of this because it's settling the Orly Trust shares. Instead, the Orly Trust was specifically careted out and, in fact, Dalia, on behalf of the Orly Trust, supposedly as the trustee, then

later went down to Delaware. And she didn't say, hey, you know what? Good news. All of my claims in this case have been settled so see you later. Bye. She went to the court and she said there is an existing case, I have existing claims and here is the settlement. And when Orly went down and tried to get involved in that settlement, then Dalia and her counsel said, no, didn't listen to what Orly had to say and then settled it against Orly's desires.

So for her to say, well, there is a provision that says that Orly should attempt to get the Orly Trust to settle, Orly wasn't involved in the settlement. She didn't cause the settlement in any way, shape or form.

Please look at our papers and -- because our papers are the only ones, the only ones to talk about what actually happened; okay? The rest of it, what Ms. Bachman is talking about, she is talking about the first day of the Yom Kippur war. She knows the next two weeks. They may win this case in Egypt. They will not win in case before this Court.

MR. ALLINGHAM: Your Honor, may I?

THE COURT: If it's something you haven't said --

MR. ALLINGHAM: It's not something I have not

said.

What emerges from all of the arguments is that everyone agrees that no claims remain for Dalia to pick up, so the motion for substitution should be denied.

I agree with Mr. Griver that the Orly Trust settled with the Trumps at some point. He and I have a disagreement about at what point. Actually, we don't even have a disagreement about at what point. I believe that the Orly Trust settled with the Trumps in June in the settlement agreement. I believe that the Orly Trust settled with the Trumps in August in Delaware --

THE COURT: How can they do it twice?

MR. ALLINGHAM: Your Honor, if you were in my position and you had been involved in this litigation as long as --

THE COURT: I understand.

MR. ALLINGHAM: I was looking for the Delaware --

THE COURT: It's belts and suspenders.

MR. ALLINGHAM: -- the Delaware guarantee with respect to title. I was looking for whatever protection I could get.

THE COURT: Okay.

MR. ALLINGHAM: Now, as to whether Orly could

settle as a beneficiary of the Orly Trust or derivatively on behalf of the Orly Trust, Justice Feinman, on January 3rd, 2013, found that Orly had derivative standing to bring claims on behalf of the Orly Trust. I argued that she didn't. I lost. Justice Feinman found that she did and that ruling is law of the case.

Orly had derivative standing to bring claims on behalf of the Orly Trust, according to Justice Feinman. In what capacity? I can't think of any other -- there may be someone, but I can't think of any other capacity than as the beneficiary. So I believed in June that when we said she is settling individually and as beneficiary of the Orly Trust, I got a release of the claims that were made against me derivatively by the Orly Trust. But, as Mr. Griver says, in August we got a release and dismissal from the Orly Trust in Delaware.

THE COURT: Thank you.

MR. ALLINGHAM: What is clear, though, is that we have a release and a dismissal of the Orly Trust claims. Everyone seems to agree to that and there are no claims pending here to substitute it.

THE COURT: So it seems, but I will read your papers and I will keep an open mind and I will issue a

decision.

It's your motion, so you will upload this transcript in the E-Filing system. I see I have a nice file here. If I don't have hard copies of memos, affirmations, affidavits, I need them all due on or before April 8th. Exhibits can remain E-Filed.

Thank you.

MR. ALLINGHAM: Thank you, your Honor.

MR. DELLAPORTAS: Thank you, your Honor.

****

CERTIFIED THAT THE FOREGOING IS A TRUE AND ACCURATE TRANSCRIPT OF THE ORIGINAL STENOGRAPHIC MINUTES IN THIS CASE.

ERIC ALLEN
SENIOR COURT REPORTER

FILED: NEW YORK COUNTY CLERK 11/15/2016 05:00 PM INDEX NO. 109749/2009
NYSCEF DOC. NO. 1440 RECEIVED NYSCEF: 11/15/2016

In The Matter Of:

ORLY GENGER v.

DALIA GENGER ET AL.

Rochelle Fang, Sagi Genger, Orly Genger

August 08, 2016

Supreme Court State of New York

Original File 080816GENGER.txt

Min-U-Script®

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : CIVIL TERM : PART 12

----------x

ORLY GENGER, in her individual capacity and on behalf of the Orly Genger 1993 Trust (both in its individual capacity and on behalf of D&K Limited Partnership),

Plaintiff,

-against-

Index No. 109749/09

DALIA GENGER, SAGI GENGER, LEAH FANG, D&K GP LLC, and TPR INVESTMENT ASSOCIATES, INC.,

Defendants.

----------x

August 8, 2016
60 Centre Street
New York, NY 10007

B e f o r e:

HON. IRA GAMMERMAN, Judicial Hearing Officer.

A p p e a r a n c e s:

KASOWITZ, BENSON, TORRES, & FRIEDMAN, LLP
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1633 Broadway
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BY: ERIC D. HERSCHMANN, ESQ., and
MICHAEL PAUL BOWEN, ESQ.

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101 Park Avenue
New York, New York 10178
BY: JOHN G. DELLAPORTAS, ESQ.

MINUTES OF NONJURY TRIAL

Reported By:
John Phelps, and
William L. Kutsch
Senior Court Reporters

was settling it.

Q So other people aside from yourself were also giving up things as consideration with respect to the $32 million payment?

MR. DELLAPORTAS: Objection.

THE COURT: Sustained.

If we have the document, I assume that's one of the exhibits or will be?

MR. BOWEN: I think it's in evidence.

THE COURT: All right. So the document will reflect who gets what and who is giving up what.

Let's move on.

Q Did you receive any money or your trust receive any money from this settlement agreement?

A No.

Q Are you expecting to receive any money yourself personally from this settlement agreement?

A No.

Q Are you expecting that your trust, the Orly Genger trust, is going to receive any money from the settlement agreement?

A No.

MR. BOWEN: May I have one second, Judge?

THE COURT: Okay.

(Pause in the proceedings.)

THE COURT: Counsel, you said you wanted to call

her. She is here. Ask her questions please.

MR. DELLAPORTAS: Your Honor --

THE COURT: I thought we were finished.

MR. BOWEN: No. I just wanted to consult with my lead chair.

THE COURT: I was hopeful.

MR. BOWEN: I now pass the witness.

THE COURT: Go ahead.

MR. DELLAPORTAS: I would prefer to call her as part of my case.

THE COURT: This is part of your case. Go ahead.

MR. DELLAPORTAS: I understand. I don't have any exhibits with me.

THE COURT: It's okay. You knew what you were going to do.

Let's go ahead.

MR. DELLAPORTAS: I don't have the exhibits with me, your Honor.

THE COURT: We don't need the exhibits. Ask whatever questions you have without the exhibits.

MR. DELLAPORTAS: Okay.

CROSS-EXAMINATION

BY MR. DELLAPORTAS:

Q Miss Genger, you said you signed a settlement agreement for $33 million; is that correct?

THE WITNESS: That's in evidence; isn't it?

MR. DELLAPORTAS: Yes. It's a foundational question, your Honor.

THE COURT: Go ahead.

Q And you said, if I wrote correctly, you don't know who gets the money?

A Correct.

Q It's not of interest to you?

THE COURT: Are you interested in who gets the money?

THE WITNESS: Yeah. Sure.

Q You never asked anybody how there's a pot of $33 million here, who is going to get it; that's what you are telling the judge?

A There isn't a pot of $33 million.

THE COURT: Well, do you expect to receive a portion of that $33 million at some point?

THE WITNESS: At this point, no.

THE COURT: Well, at what point? At any point?

THE WITNESS: It's depends on how things --

THE COURT: Do you think that -- you think your right to receive or the amount that you will receive or whether you will receive depends on what happens in this case?

THE WITNESS: No.

THE COURT: Is there another case that will affect that?

THE WITNESS: No. It's just a matter of, I know that the Trumps were estopped in paying money because my mother filed a lawsuit.

THE COURT: Well, that's the lawsuit in the Surrogates' Court?

THE WITNESS: Right.

THE COURT: Okay.

THE WITNESS: Because she filed a lawsuit, now they won't pay.

THE COURT: At some point, when that lawsuit is resolved, do you expect to receive a portion of the $33 million?

THE WITNESS: I don't expect to. I hope that I will, but I don't know.

THE COURT: Okay. That's the answer.

Q Miss Genger, so we are clear, approximately $18 million will be paid; is that correct?

THE COURT: I missed the question.

Q Approximately $18 million of the 32, 33 has already been paid; is that correct?

A I don't know exactly.

THE COURT: It's in escrow with the lawyer.

MR. DELLAPORTAS: No, your Honor. $18 million has

been distributed.

THE COURT: Has been distributed?

MR. DELLAPORTAS: Yes.

THE COURT: Have you received any money of the $18 million?

THE WITNESS: No.

Q Where did that go?

A I don't know.

Q You're a signatory to a settlement agreement. You have no idea where $18 million went?

A I believe it went to pay off Broser and other things but I don't know.

Q Who are the Brosers?

A Arnold Broser and David Broser. They are people who helped fund litigations and gave us funds for living.

Q So they loaned you money?

A Yes.

Q So part of that $18 million, or maybe all of the $18 million that's already been paid, went to your creditors; correct?

MR. HERSCHMANN: Objection. Calls for speculation.

THE COURT: Well, we don't know if they're creditors. You didn't get any of the $18 million?

THE WITNESS: No.

THE COURT: Next question.

O. Genger - by Plaintiff - Cross

Q But the Brosers are your creditors; correct?

MR. BOWEN: Objection.

THE COURT: Overruled.

Did they loan money to you and your father in order to finance the lawsuit?

THE WITNESS: They loaned money to my father.

Q In fact, you were a co-plaintiff in that lawsuit that they loaned money to; correct? We have the complaint here.

THE COURT: You were one of the plaintiffs in the lawsuit.

THE WITNESS: Which lawsuit?

Q The lawsuit in New York.

THE COURT: The lawsuit that was settled as a result of the agreement.

MR. DELLAPORTAS: Yes.

THE WITNESS: Sorry. What we signed?

THE COURT: You were one of the plaintiffs.

THE WITNESS: I'm sorry. Can you show me?

THE COURT: All right. Everybody stop.

There is an agreement settling a lawsuit. That's the agreement under which the $33 million was paid, 18 of which has already been paid, as I understand it?

THE WITNESS: Yes.

MR. HERSCHMANN: Your Honor, for the record --

THE COURT: Were you one of the plaintiffs in that

FILED: NEW YORK COUNTY CLERK 05/07/2015 03:07 PM INDEX NO. 651089/2010
NYSCEF DOC. NO. 1279 RECEIVED NYSCEF: 05/07/2015

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. BARBARA JAFFE **PART 12**
Justice

ARIE GENGER and ORLY GENGER, in her individual capacity and on behalf of THE ORLY GENGER 1993 TRUST,

Plaintiffs,

- v -

SAGI GENGER, TPR INVESTMENT ASSOCIATES, INC., DALIA GENGER, *et al.*,

Defendants.

INDEX NO. 651089/2010
MOTION DATE
MOTION SEQ. NO. 42
CALENDAR NO.

INTERIM ORDER

The following paper, numbered 1, was read on this motion.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answer — Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Defendant Dalia Genger's motion for an order substituting her, as trustee, as plaintiff for Orly Genger's Trump Group claims, and for an order pursuant to CPLR 2701 directing that the Trump Group settlement fund be paid into Court is held in abeyance pending the Surrogate's Court's resolution of Orly Genger's petition to remove Dalia Genger as trustee of Orly Trust. (*See Genger v Genger*, interim order dated Apr. 1, 2015, index No. 113862/2010 [mot. seq. no. 2]).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

DATED: **Dated:** 5/7/15

J.S.C. **J.S.C. BARBARA JAFFE**

Check one: ☐ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**
Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**

STATE OF NEW YORK
SURROGATE'S COURT: COUNTY OF NEW YORK

- x

In the Matter of the Application of
ORLY GENGER, as a person interested, for the removal of DALIA GENGER as Trustee of the Orly Genger 1993 Trust pursuant to SCPA §711(11)

OPPOSITION AFFIRMATION ON BEHALF OF SAGI TRUST

File No. 0017/2008

- x

JOHN DELLAPORTAS, an attorney admitted to practice in the courts of this state, hereby subscribes and affirms to be true under the penalties of perjury, pursuant to CPLR 2106, as follows:

1. I am a member of the law firm of Kelley, Drye & Warren LLP, counsel to the Remainderman Beneficiary, the Sagi Genger 1993 Trust (the "Sagi Trust"). I respectfully submit this affirmation, on behalf of the Sagi Trust, in opposition to the motion of Orly Genger ("Orly") to dismiss the cross-petition of Dalia Genger (the "Trustee"), the trustee of the Orly Genger 1993 Trust (the "Trust"). The Sagi Trust supports the Trustee's cross-petition and, more broadly, the efforts of the Trustee to recoup the $32.3 million in Trust assets that Orly misappropriated for the benefit of her father, Arie, and his creditors.

2. By this affirmation, the Sagi Trust wishes to supplement the record by noting certain additional false and misleading statements in Orly's motion papers. Most egregiously, on pages 2-3 of her Memorandum of Law, Orly falsely states that: "Sagi has now been adjudicated after trial and on summary judgment in two separate legal actions to have committed fraud against, and to have breached his fiduciary duties to, Orly, which determinations were upheld on appeal." In reality, the only finding of "fraud" liability against Sagi (relating to a transaction between the parties in which Orly *made* money and Sagi *lost* money) was vacated (not affirmed) on appeal. *See Genger v Genger*, 144 A.D.3d 581 (1st Dep't 2016). As the same counsel who signed Orly's brief also argued her appeal, his false statement is very puzzling.

3. The other lawsuit against Sagi to which Orly refers (the "2009 Action") turned out to be even more meritless. Last August, J.H.O. Gammerman presided over a two-week trial in the case, following which he found that Orly had suffered zero damages from the complained-of conduct. *See Genger v. Genger*, N.Y. Cnty. Sup. Ct. Index No. 109749/2009, NYSCEF Doc. No. 1512. Orly curiously fails to mention this outcome either.

4. Lastly, Orly also neglects to tell the Court that in 2010 she filed *a third* meritless lawsuit against Sagi, also supposedly on behalf of the Orly Trust (the "2010 Action"). In 2014, all claims against Sagi, and the Company he ran, TPR, and the Sagi Trust were thrown out by the Appellate Division, First Department, in a unanimous decision penned by Justice Helen Freedman. *See Genger v. Genger*, 121 A.D.3d 270 (1st Dep't 2014).

5. In that same suit, however, in 2013 Orly recovered $32.3 million from the Trump Group (former friends and business partners of Arie Genger), by compromising the Trust's claim to beneficial ownership in a black of shares of Trans-Resources, Inc. Yet, to date – contrary to New York law – she has turned over none of the proceeds to the Trust. No court has ever adjudicated the proper recipient of the proceeds, because Orly obtained a discontinuance of her derivative suit while refusing to show the underlying settlement agreement to either the Trustee or the Sagi Trust (even on an "attorney's eyes only" basis).

6. The irony here is that the Trustee procured a settlement of approximately $11 million from Sagi-run TPR in exchange for a release of the Trust's claims against TPR in the 2009 and 2010 Actions, but Orly had that settlement voided based on the Trustee's supposed "conflict of interest." Incredibly, Orly now *brags* about that result on page 3 of her brief, claiming that the $11 million settlement makes the Trustee "unfit to serve as trustee." As noted above, however, Orly then recovered $0 for the Trust on these same suits.

STATE OF NEW YORK
SURROGATE'S COURT: COUNTY OF NEW YORK

- x

In the Matter of the Application of
ORLY GENGER, as a person interested, for the removal of DALIA GENGER as Trustee of the Orly Genger 1993 Trust pursuant to SCPA §711(11)

AFFIDAVIT OF SERVICE BY FEDERAL EXPRESS

File No. 0017/2003

- x

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

Kristina M. Allen, being duly sworn, deposes and states:

1. I am not a party to this action, and am over 18 years of age.

2. On the 26th day of September, 2017, I served the Opposition Affirmation on behalf of the Sagi Trust, dated September 26, 2017, upon the following attorneys at the addresses designated by them for service of papers:

Eric D. Herschmann
Kasowitz Benson Torres LLP
1633 Broadway
New York, New York 10019

Judith Bachman
254 S. Main Street, Suite 306
New York, New York 10956

by depositing a true copy thereof, in a secure envelope with Federal Express, for overnight delivery.

Kristina M. Allen

Sworn to before me this
26 day of September, 2017.

Notary Public

SAMMY TONY SIMON
Notary Public, State of New York
No. 01SI6322471
Qualified in New York County
Commission Expires 04/06/2019

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the matter of the Application of ORLY GENGER, as a person interested, for the removal of DALIA GENGER, as Trustee of the Orly Genger 1993 Trust pursuant to SCPA § 711(11).

File No.: 2008-0017

Surrogate Nora S. Anderson

AFFIRMATION OF SERVICE

I am an attorney admitted to practice before the Courts of the State of New York. On September 25, 2017, on behalf of petitioner Orly Genger, I caused to be served by hand delivery a true and correct copy of Orly Genger's Notice of Motion to Dismiss the Cross-Petition of Dalia Genger, the Memorandum of Law in Support of Petitioner's Motion to Dismiss Dalia Genger's Cross-Petition, and the Affirmation of Michael Paul Bowen and exhibits thereto, dated September 8, 2017, on the Guardian Ad Litem in this action at the following address:

Steven Riker, Esq.
Law Office of Steven Riker
One Grand Central Place, 46th Floor
New York, New York 10165

Dated: New York, New York
September 26, 2017

Andrew R. Kurland

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the matter of the Application of ORLY GENGER, as a person interested, for the removal of DALIA GENGER, as Trustee of the Orly Genger 1993 Trust pursuant to SCPA § 711(11).	File No.: 2008-0017 Surrogate Nora S. Anderson

REPLY AFFIRMATION OF MICHAEL PAUL BOWEN IN SUPPORT OF ORLY'S MOTION TO DISMISS CROSS-PETITION

MICHAEL PAUL BOWEN, duly admitted to practice law before the courts of the State of New York, affirms the following to be true under penalties of perjury pursuant to CPLR 2106:

1. I am counsel to petitioner Orly Genger, and submit this reply affirmation in further support of Orly's motion to dismiss the cross-petition of Dalia Ganger ("Dalia") (cited herein as "Orly Mem.") and in reply to the opposition submissions by Dalia, dated September 25, 2017, and by Sagi Genger ("Sagi"), dated September 26, 2017, (which submissions are cited herein as "Dalia Mem." and "Sagi Opp.", respectively).

2. The submissions by Dalia and Sagi do not address the core defect in her cross-petition – the undisputed fact that it is based on a claim that was already litigated and is barred by *res judicata*. Instead, both Sagi and Dali continue to try to deflect from this simple truth by clouding the record with fanciful claims that are, not only false, but irrelevant to the immediate procedural issue. In fact, these submissions show, yet again, that Dalia is arrayed *against* the interests of the trust beneficiary, Orly, and is in league with Sagi – who has now been adjudicated *twice* to have committed fraud and breach of fiduciary duties against Orly. That is reason enough – as is demonstrated in Orly's petition in this case – for the immediate removal of

Dalia as trustee. By not voluntarily resigning that position, Dalia has used it for years and continues to use it to this day to serve her own conflicted interests and those of her son, Sagi.

3. Dalia has thus violated – and continues to violate – her fundamental obligation as a fiduciary of the duty of undivided loyalty. The fact that she let Sagi, who has already been adjudicated to be adverse to Orly, draft and submit papers on her behalf in this proceeding proves that she is irreconcilably conflicted and should be removed as trustee.

4. Her meritless cross-petition is just yet another example of her antipathy to and conflict with Orly. It should be dismissed with prejudice.

A. Neither Dalia Nor Sagi Refute the *Res Judicata* Bar

5. In her opposition, Dalia pushes her claim that Orly's settlement with the Trump Group somehow implicated claims owned by the Orly Trust. But that argument, such as it is, ignores the central flaw in her cross-petition: The undeniable fact that Dalia failed to object to this settlement at the time Orly entered into it on behalf of herself and the fact that, previously, Dalia herself dismissed *with prejudice* any claims the Orly Trust had against the Trump Group. This was held by the First Department to preclude the very claims that Dalia again tries to raise here in her cross-petition:

> Defendant Dalia Genger, as Trustee for the Orly Genger 1993 Trust (Orly Trust), failed to articulate any objection to the court's entry of the November 25, 2014 order dismissing plaintiff Orly Trust's breach of fiduciary duty and unjust enrichment claims against certain defendants, and her claim is not properly before this Court. In any case, that order did not dismiss any claims; rather, it recognized that all claims had previously been dismissed or discontinued by prior court orders, dismissed the complaint, and severed other viable third party claims, cross claims, and counterclaims unrelated to the Orly Trust.

Arie Genger v. Sagi Genger, 144 A.D.3d 581, 581 (1st Dep't 2016). As discussed in Orly's moving papers, that decision is proof positive that Dalia's cross-petition is barred by *res judicata*. Orly Mem. at 8-10.

6. In her opposition, Dalia just ignores these hard facts, as already determined by the Appellate Division -- a determination that is binding on this Court. Dalia's lack of response on this point of law is further confirmation, if any there need be, that her cross-petition is not sustainable. *See* Dalia Mem. at 4-6; Sagi Opp. ¶ 4. *See also* Bowen Affirm., dated September 8, 2017, Ex. D ¶ 4.

B. <u>The Opposing Submissions are Rife with Falsehood</u>

7. The rest of the misguided opposition by both Dalia and her confederate Sagi sheds no further light on the viability of the cross-petition. Rather, these submissions are textbook examples of misdirection and obfuscation.

8. Sagi's inflammatory affirmation in opposition mischaracterizes the various courts' rulings, as the opinions themselves demonstrate.

9. First, contrary to what Sagi states (Sagi Opp. ¶ 2), the Appellate Division did not reverse specific findings of Supreme Court that supported Orly's fraud claim against Sagi in her 2008 fraud action. After a months-long bench trial on the liability phase of a bifurcated trial, Supreme Court held Sagi liable for fraud and set the matter over for a damages hearing. On appeal, the Appellate Division vacated the judgment as to liability and remanded, holding that liability on the fraud claim could not be determined before concluding the damages stage of trial. In so ruling, the Appellate Division specifically rejected Sagi's arguments against the trial court's findings that Orly had established through clear and convincing proof all the other elements of fraud other than damages, including his false statements, her reasonable reliance and

his fraudulent intent, as well as the trial court's findings that Sagi provided false testimony, falsified documents and generally lacked credibility. On these elements, the appellate court ruled:

> The evidence otherwise supported the court's finding that Orly had satisfied her burden of proving the remaining elements of her cause of action for fraud in the inducement. We find no basis to disturb the court's factual findings and credibility determinations.

Orly Genger v. Sagi Genger, 144 A.D.3d 581, 581 (1st Dep't Nov. 29, 2016).

10. Sagi, in fact, tried a second time, by a motion to reargue before the Appellate Division, to convince the appeals court to vacate the entirety of the trial court's findings, essentially asking to re-do the entire liability-stage trial and for recusal of the trial judge who has presided for years over this and related litigation between Orly and Sagi and who presided over the months-long bench trial (Jaffe, J.). The First Department *again* rejected his arguments, summarily denying the motion to reargue. *Orly Genger v. Sagi Genger*, Feb. 28, 2017 App. Div. Order No. M-6660, Index No. 100697/08.

11. Second, in paragraph 3 of his opposition, Sagi falsely claims that Orly's claims against Sagi in the "2009 Action" resulted in a finding of no damages. (This breach of fiduciary duty case is related to, but was litigated as a separate case from, the 2008 fraud case discussed above.) Again, Sagi's assertion is demonstrably false. In the 2009 Action, Supreme Court found that Sagi had breached fiduciary duties he owed Orly. *Orly Genger v. Dalia Genger*, No. 109749/09, 2016 WL 1407903 (Sup. Ct. N.Y. Cnty. Apr. 8, 2016). This finding was unanimously *affirmed in full* by the Appellate Division. *Orly Genger v. Dalia Genger*, 147 A.D.3d 443 (1st Dep't 2017). Afterward, a judicial hearing officer made a recommendation awarding Orly no monetary damages. But this is not yet decided. Supreme Court has yet to render decision. It is *sub judice* and the JHO recommendation was challenged by Orly on

various grounds. Therefore, the issue as to Orly's damages resulting from Sagi's breach of his fiduciary duties simply has not yet been decided.

12. More importantly, the question of damages is irrelevant to this proceeding and the pending motion to dismiss the cross-petition: What is relevant is the trial court and the First Department both held Sagi liable for breach of his fiduciary duties to Orly, and the fact that Dalia – in yet again exhibiting her disqualifying conflicts of interests and unfitness to serve as trustee for Orly's trust – sided with Sagi and still sides with Sagi despite these adjudications of his fraud and breach of fiduciary duties that he (and Dalia) perpetrated against Orly.

13. Dalia's opposition is likewise replete with falsehoods (not to mention typos). Like a broken record, Dalia continues to make the exact same arguments in a further attempt to delay the final resolution of this matter and further harm her daughter and granddaughter.

14. Dalia is wrong when she argues that the Guardian Ad Litem in this action – Mr. Steve Riker, Esq. – represents Orly's daughter in this proceeding. Dalia Mem. at 1, 12. It is indisputable that Mr. Riker was appointed in 2014 to represent *only* the interests of *unborn* children, who are (theoretically) contingent beneficiaries of the Orly Trust. (At the time of the appointment of the Guardian over two years ago, Orly did not have any children.) *See* Order Appointing Guardian Ad Litem, filed Dec. 11, 2014 ("It is Ordered, that Steven M. Riker, Esq., is hereby appointed the guardian ad litem of: UNBORN CHILDREN.").

15. Mr. Riker is *not* the guardian of Orly's newborn daughter, who was born in 2017. Under New York law, her parents are presumptively entitled to act as her guardian. *See, e.g., In re Judicial Settlement of First Intermediate Account of Proceedings of Mfrs. Of Hanover Trust Co.*, 83 A.D.2d 808, 808 (1st Dep't 1981) ("It is the policy of this state to encourage parents to act as guardians, thereby avoiding unnecessary appointments and the expense of a guardian ad

litem"). Absent further court order, Mr. Riker is limited to representing only theoretical "unborn children," not the actual daughter of Orly and her husband.

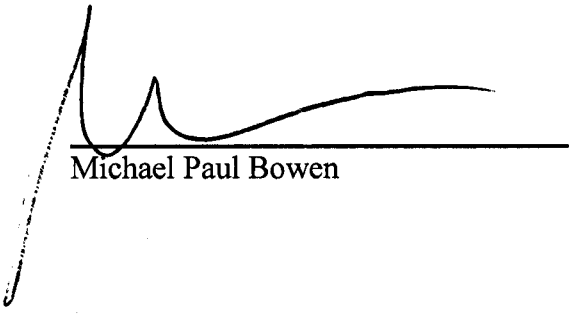
16. Furthermore, Point II of Dalia's argument (Dalia Mem. at 15-17), which argues against Orly being allowed to select the successor trustee, is wholly inapposite. It is not germane to any issue on this motion to dismiss.

17. Finally, in all the "smoke" of the misleading and irrelevant "issues" raised by Sagi and Dalia, Dalia ignores the massive record of her infidelity to Orly as the trust beneficiary. That is, perhaps, poignantly demonstrated by the fact that *Sagi's* lawyers drafted Dalia's answer and amended answer with cross-petition in this proceeding. *See* Orly Mem. at 5-7. Dalia does not even try to address this point -- because there is obviously nothing she can say in good faith to dispute it. *See* Dalia Mem. at 8 n.1 (admitting that Sagi's counsel filed Dalia's original answer, but ignoring that he also filed Dalia's August 12, 2017 amended answer and cross-petition and the fact that her signature on that pleading does not match her actual signature that appears on the verification).

CONCLUSION

For the foregoing reasons and those set forth in Orly's opening papers on this motion, this Court should dismiss the cross-petition with prejudice, and award Orly such other and further relief that is just and proper.

Dated: New York, New York
October 2, 2017



Michael Paul Bowen

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the matter of the Application of ORLY GENGER, as a person interested, for the removal of DALIA GENGER, as Trustee of the Orly Genger 1993 Trust pursuant to SCPA § 711(11).	File No.: 2008-0017 Surrogate Nora S. Anderson

AFFIRMATION OF SERVICE

I am an attorney admitted to practice before the Courts of the State of New York. On October 2, 2017, on behalf of petitioner Orly Genger, I served by U.S. First Class Mail, postage prepaid, a true and correct copy of the Reply Affirmation of Michael Paul Bowen in Support of Orly Genger's Motion to Dismiss Cross-Petition, dated October 2, 2017, on the parties to this action, through their counsel, and the Guardian Ad Litem, as follows:

Counsel to Respondent/Cross-Petitioner Dalia Genger:

Judith Bachman, Esq.
254 S. Main Street, Suite 306
New City, New York 10956

Counsel to Respondent Sagi Genger:

John Dellaportas, Esq.
Kelley, Drye & Warren, LLP
101 Park Avenue
New York, New York 10017

Guardian Ad Litem:

Steven Riker, Esq.
Law Office of Steven Riker
One Grand Central Place, 46th Floor
New York, New York 10165

Dated: New York, New York
October 2, 2017

Andrew R. Kurland

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the matter of the Application of ORLY GENGER, as a person interested, for the removal of DALIA GENGER, as Trustee of the Orly Genger 1993 Trust pursuant to SCPA § 711(11).

File No.: 2008-0017

Surrogate Nora S. Anderson

STIPULATION TO ADJOURN MOTION TO DISMISS

IT IS HEREBY STIPULATED AND AGREED as follows:

1. The return date of the motion to dismiss filed by petitioner Orly Genger, dated September 8, 2017, is adjourned from October 3, 2017 to October 17, 2017.

2. Photocopies and/or facsimile copies of this Stipulation shall be valid as if signed in original.

Dated: New York, New York
October 2, 2017

John Dellaportas /AK w/ permission

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Guardian Ad Litem

STATE OF NEW YORK
SURROGATE'S COURT: COUNTY OF NEW YORK

In the Matter of the Application of ORLY GENGER, as a person interested, for the removal of DALIA GENGER as Trustee of the Orly Genger 1993 Trust pursuant to SCPA §711(11)	MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS File No. 0017/2008

The Sagi Genger 1993 Trust (the "Sagi Trust"), as the Remainderman Beneficiary to the Orly Genger 1993 Trust (the "Trust"), respectfully submits memorandum of law in further opposition to the motion of motion of Orly Genger ("Orly") to dismiss the cross-petition of Dalia Genger (the "Trustee"), and specifically to address the claim that the Trustee's claims are somehow barred by "res judicata." Simply put, the Trust's entitlement to the $32.3 million in proceeds from the settlement of the Trust's claims against the Trump Group has never been adjudicated. That issue is now squarely before this Court.

Orly does not, indeed she cannot, dispute that: (a) she brought derivative claims on behalf of the Trust in the case entitled *Arie Genger et al v. Sagi Genger et al*, Index No. 651089/2010; (b) that she settled the derivative Trust claims in 2013 for $32.3 million; and (c) to date, she has remitted none of those settlement proceeds to the Trust. Nor can she dispute that, under New York law, the proceeds from a derivative settlement belong to the injured party (in this case, the Trust), not the derivative plaintiff (in this case, Orly). *See Sakow v Waldman*, 124 A.D.3d 860, 863 (2d Dep't 2015) ("A shareholder of a corporation, even of a closely held corporation, may not recover in his or her individual capacity for wrongs committed against the corporation, and any recovery obtained pursuant to a derivative cause of action asserted by a shareholder is obtained for the benefit of the injured corporation.")

However, Orly claims that the Trustee is somehow barred by the doctrine of "res judicata" from recovering the settlement proceeds for the Trust. That is utterly baseless. Under

New York law, in order for the terms of a settlement (beyond just the dismissal of the underlying case) to be *res judicata*, the terms of the settlement must be "agreed to by all parties present … [and] recorded in the minutes of the court." *Samerson v. Mather Mem. Hosp.*, 1995 NYLJ Lexis 2533, *11 (Sup. Ct. Suffolk Cnty. 1995); *see also United States Trust Co. v. Alpert*, 10 F. Supp. 2d 290, 1997 U.S. Dist. Lexis 24081 (S.D.N.Y. 1998) (rejecting similar argument that claim to settlement proceeds was barred by *res judicata* argument where the settling "court never considered any of the 346 Indentures at issue here nor the rights of the unitholder parties to those Indentures and obviously never decided who, as parties to the Indentures, would be entitled to distribution of the amount given to the Trustees herein").

That was not done here. Orly deliberately concealed the terms of the settlement from the Trustee, and then discontinued the action pursuant to a so-ordered Stipulation (NYSCEF DOC. NO. 487) that makes no mention whatsoever of any settlement proceeds, let alone determining the correct allocation thereof. The only res judicata is the dismissal of the Trust's claims. The Supreme Court never addressed the question of allocation of settlement proceeds; the closest it came was to hold "in abeyance" – in favor of this very proceeding – the Trustee's motion to have those proceeds deposited in that Court. (NYSCEF DOC. NO. 1279).

Accordingly, the Sagi Trust respectfully requests that Orly's motion be denied.

Dated: New York, New York
October 9, 2017

JOHN DELLAPORTAS
Kelley Drye & Warren LLP
101 Park Avenue
New York, New York 10178
(212) 808-7800
Attorneys for Sagi Trust

STATE OF NEW YORK
SURROGATE'S COURT: COUNTY OF NEW YORK

In the Matter of the Application of ORLY GENGER, as a person interested, for the removal of DALIA GENGER as Trustee of the Orly Genger 1993 Trust pursuant to SCPA §711(11)	AFFIRMATION OF SERVICE File No. 0017/2008

JOHN DELLAPORTAS, an attorney and counselor at law admitted to practice in the Courts of the State of New York, hereby affirms the following statements to be true under the penalties of perjury pursuant to CPLR 2106. I am over the eighteen years old and not a party to this action. On October 9, 2017, I caused to be served a copy of the attached Memorandum of Law in Opposition to Motion to Dismiss upon the following counsel:

Eric Herschmann
Kasowitz Benson Torres LLP
1633 Broadway
New York, New York 10019
Counsel to Petitioner Orly Genger

Steven Riker, Esq.
Law Office of Steven Riker
One Grand Central Place, 46th Floor
New York, NY 10165
Guardian At Litem

Judith Lisa Bachman, Esq.
254 S. Main Street, Suite 406
New City, New York 10017
Counsel to Respondent Dalia Genger

by placing the documents in a sealed envelope with postage thereon fully pre-paid and then depositing the envelope in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

JOHN DELLAPORTAS

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X File No. 2008-0017

In the Matter of the Application of ORLY GENGER, as a person interested, for the removal of DALIA GENGER, as Trustee of the Orly Genger 1993 Trust pursuant to SCPA §711(11)

AFFIRMATION OF STEVEN RIKER, ESQ. IN RESPONSE TO ORLY GENGER'S MOTION TO DISMISS CROSS PETITION

----------X

STEVEN RIKER, an attorney duly admitted to practice law before the Courts of the State of New York, hereby affirms the following to be true subject to the penalties of perjury:

1. I was appointed by an Order of the Hon. Nora S. Anderson to serve as the Guardian ad Litem of unborn children of Petitioner Orly Genger ("Orly") in this miscellaneous proceeding.

2. Since such time, I have thoroughly acquainted myself with the rights and interests of my wards in the above-entitled proceeding, and I have reviewed all the documents on file pertaining thereto.

3. I submit this affirmation in response to the instant motion of Orly, which seeks to dismiss the recently filed Cross Petition of Dalia Genger, Trustee of the Orly Genger 1993 Trust.

BACKGROUND

4. Orly is the primary beneficiary of an irrevocable inter vivos trust established by her father, Arie Genger ("Arie"), on or about December 13, 1993 (the "Orly Trust"). Orly has sought the removal of her mother, Dalia Genger ("Dalia"), as trustee of said Trust, pursuant to her Third Amended Petition (the "TAP").

5. The Orly Trust provides for discretionary principal distributions to Orly for life, and the remainder to her descendants, or if she has no descendants, to a trust that Arie established

for the benefit of Orly's brother, Sagi Genger (the "Sagi Trust"). Upon information and belief, Orly now has an infant daughter.

6. Pursuant to the allegations of the TAP, Dalia has, *inter alia*, colluded with Sagi to loot the Orly Trust of its interests in two closely-held Genger family businesses – TPR Investment Associates, Inc. ("TPR") and Trans-Resources, Inc ("TRI"). Dalia has allegedly engaged in such action as a form of retribution to her daughter, Orly, who took the side of her father, Arie, during his divorce from Dalia (while Sagi took the side of his mother, Dalia). As such, it is alleged that Dalia, in concert with Sagi, has breached her fiduciary duties as trustee of the Orly Trust.

7. Pursuant to the allegations of the recently filed Cross Petition, Orly, *inter alia*, acted as a *de facto* trustee of the Orly Trust and breached her fiduciary duties in such capacity by bringing and settling a derivative action, on behalf of said Trust, as against the purchasers of certain shares of TRI – Glenclova Investment Company, TR Investors, LLC, New TR Equity I, LLC, and New TR Equity II, and TRI (the "Trump Group Entities") – without depositing the proceeds of such settlement into the Orly Trust. The Cross Petition contains causes of action sounding in breach of fiduciary duty, breach of loyalty, turnover, accounting, unjust enrichment, self-dealing, and successor trustee appointment.

DISCUSSION

8. As an initial matter, it is noted that counsel for Dalia has incorrectly stated that your affirmant was recently appointed to represent Orly's infant daughter (see Dalia Mem. at 12). As this Court is aware, your affirmant was appointed as GAL by Order dated December 11, 2014, several years before Orly had a child, and thus, was not appointed for the purpose of

representing the interests of Orly's newborn daughter.

9. Additionally, I note that counsel, despite alleging that I was appointed to represent Orly's infant daughter, failed to identify either your affirmant or her daughter as an interested party in her Cross Petition, and initially failed to serve your affirmant with the Cross Petition (although that has now been rectified).

A. **De Facto Trustee**

10. The main thrust of Dalia's Cross Petition is that Orly breached her fiduciary duty to the Orly Trust by failing to pay any portion of the $32.3 million to the Trust that she obtained in a settlement with the Trump Group Entities involving the rightful ownership of the TRI shares. It is alleged by Dalia that Orly brought a derivative action on behalf of the Orly Trust against the Trump Group Entities, seeking redress in an individual and representative capacity, and, as such, owed a fiduciary duty to the Trust. In essence, the allegation is that Orly acted as a *de facto* trustee.

11. New York recognizes "the concept of a de facto trustee" (Matter of Monfort, NYLJ, Dec. 13, 1995 (Sur Ct, Nassau County)(citing Matter of Sakow, 160 Misc.2d 703 (Sur Ct, Bronx County 1994)).

12. "A de facto trustee is one who assumes a position under color of title and actually exercises the duties of office and can reasonably expect to be held accountable for trust related activities" (Matter of Prins, NYLJ, July 23, 2008, at 30, col 3 (Sur Ct, New York County) (citations omitted).

13. Thus, assuming, *arguendo*, that Orly acted in a representative capacity, she may be deemed a *de facto* trustee with fiduciary duties owed to the other trust beneficiaries, including

the obligation to deposit the Trust's share of any settlement proceeds into a Trust account, or such other account as may be directed by a court of competent jurisdiction, due to her pending proceeding to remove Dalia as Trustee of the Orly Trust.

B. **Res Judicata**

14. However, it appears that res judicata bars such claims at this juncture, since the Appellate Division, First Department, in Genger v. Genger, 144 A.D.3d 581, 41 N.Y.S.3d 414 (1st Dept. 2016) held that:

> Defendant Dalia Genger, as Trustee for the Orly Genger 1993 Trust (Orly Trust), failed to articulate any objection to the court's entry of the November 25, 2014 order dismissing plaintiff Orly Trust's breach of fiduciary duty and unjust enrichment claims against certain defendants, and her claim is not properly before this Court (*Horizon Asset Mgt., LLC v Duffy, 106 AD3d 594, 595, 967 N.Y.S.2d 17 [1st Dept 2013]*). In any case, that order did not dismiss any claims; rather, it recognized that all claims had previously been dismissed or discontinued by prior court orders, dismissed the complaint, and severed other viable third party claims, cross claims, and counterclaims unrelated to the Orly Trust.

15. Indeed, to the extent that Dalia previously alleged, or had a full and fair opportunity to allege, that some, or all, of the $32.3 million settlement with the Trump Group Entities belonged to the Orly Trust, such claims are now barred by prior court orders.

C. **Statute of Limitations**

16. Additionally, it is respectfully submitted that the fiduciary duty claim may be time-barred. New York applies different statutes of limitations for claims alleging breach of

fiduciary duty, depending on the remedy sought (see Kaufman v Cohen, 307 AD2d 113, 118 (1st Dep't 2003). For equitable relief, the six-year limitations period in CPLR 213(1) applies. However, when the plaintiff seeks only money damages, courts interpret the claims as alleging injury to property, which is subject to the three-year limitations period set forth in CPLR 214(4). Additionally, claims for breach of fiduciary duty generally accrue, and the statute of limitations begins to run, as of the date of the alleged breach, not when it was discovered (see IDT Corp. v Morgan Stanley, 12 NY3d 132, 140 (2009).

17. In the case at bar, Dalia has sought monetary damages in the sum of $32.3 million against Orly for her alleged breach of fiduciary duty, and thus, the three-year statute of limitations, pursuant to CPLR 214(4), should apply herein.

18. Furthermore, based upon Dalia's representations in her Cross Petition, that:

(i) "In June 2013, Orly disclosed that she had 'entered into a confidential settlement agreement to resolve all issues among the stipulating parties,'" which included the Trump Group Entities (Dalia Cross Petition at ¶12);

(ii) "By letter dated June 28, 2013, counsel to the Trump Group Entities wrote to the court on behalf of all settling parties . . .confirming that: 'A material term of the agreement among the settling parties was the dismissal of all claims presently pending against one another, in whatever capacity they were brought. [If the settlement stipulation was drafted so as to] have the effect of not dismissing Orly Genger's derivative claims against the Trump Group [Entities], contrary to the agreement of the settling parties . . .'" [sic] (Dalia Cross Petition at ¶13); and

(iii) "Months later, as part of a parallel proceeding, the United States District Court directed Orly to produce her settlement agreement with the Trump Group Entities . . . The document revealed that Orly had settled her claims against the Trump Group Entities both 'in her individual capacity and in her capacity as beneficiary of the Orly Genger 1993 Trust – the latter being the very capacity by which the Supreme Court permitted Orly to assert derivative claims.'" (Dalia Cross Petition at ¶15)

it appears that Dalia was aware, as early as June, 2013, and certainly within "months" thereafter, that Orly had effectuated a settlement with the Trump Group Entities, in both, an alleged, individual and representative capacity, and did not deposit the settlement proceeds into an Orly Trust account. Yet, Dalia did not bring a claim against Orly until on or about August 12, 2017, well more than three years later.

19. Additionally, since the breach of loyalty cause of action is a mirror image of the breach of fiduciary duty, and is based upon the same facts, it, too, would suffer the same time-barred fate.

20. Accordingly, it is respectfully submitted that the Cross Petition may be subject to dismissal on multiple grounds.

CONCLUSION

21. Thus, except to the extent that i) Orly may be deemed a temporary *de facto* trustee with concomitant fiduciary duties owed to the other trust beneficiaries, and ii) the Cross Petition may be time-barred, your affiant respectfully submits that the issues on the motion have been

sufficiently briefed by Orly (with whom my wards' share many of the same interests), and that my wards' interests are adequately protected thereby. To that extent, I will respectfully rely upon the motion papers and legal arguments advanced by Orly, and submit that the Cross Petition should be dismissed.

Dated: New York, New York
October 13, 2017

STEVEN RIKER

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

In the Matter of the Application of ORLY GENGER, as a person interested, for the removal of DALIA GENGER, as Trustee of the Orly Genger 1993 Trust pursuant to SCPA §711(11)

----------X

File No. 2008-0017

AFFIRMATION OF SERVICE

I, STEVEN RIKER, an attorney duly admitted to practice law before the Courts of the State of New York, hereby affirms the following subject to the penalties of perjury

On October 13, 2017, I served the within **AFFIRMATION OF STEVEN RIKER, ESQ. IN RESPONSE TO ORLY GENGER'S MOTION TO DISMISS CROSS PETITION** by email and by depositing a true copy, enclosed in a post-paid, overnight delivery, Federal Express wrapper, in an official depository under the exclusive care and custody of Federal Express, within New York State, addressed to the following persons at the addresses set forth:

TO: John Dellaportas, Esq.
Kelley Drye & Warren LLP
Attorneys for Sagi Trust
101 Park Avenue
New York, New York 10178

Michael Paul Bowen, Esq.
Kasowitz Benson Torres LLP
Attorneys for Orly Genger
1633 Broadway
New York, New York 10019

Judith Bachman, Esq.
Attorney for Dalia Genger
254 S. Main Street, Suite 306
New City, New York 10956

STEVEN RIKER

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

FILE NO. 2008-0017

In the Matter of the Application of ORLY GENGER, as a person interested, for the removal of DALIA GENGER, as Trustee of the Orly Genger 1993 Trust pursuant to SCPA §711(11)

AFFIRMATION OF STEVEN RIKER, ESQ.
IN RESPONSE TO
ORLY GENGER'S MOTION TO DISMISS THE CROSS PETITION

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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the matter of the Application of ORLY GENGER, as a person interested, for the removal of DALIA GENGER, as Trustee of the Orly Genger 1993 Trust pursuant to SCPA § 711(11).	File No.: 2008-0017 Surrogate Nora S. Anderson

STIPULATION TO ADJOURN MOTION TO DISMISS

IT IS HEREBY STIPULATED AND AGREED as follows:

1. Due to a family medical emergency of counsel for petitioner, the parties hereto agree to adjourn the return date of the motion to dismiss filed by petitioner Orly Genger, dated September 8, 2017, from October 17, 2017 to December 8, 2017, at 9:30 a.m.

2. Photocopies and/or facsimile copies of this Stipulation shall be valid as if signed in original.

Dated: New York, New York
October 16, 2017

KELLEY DRYE & WARREN LLP
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Guardian Ad Litem

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FAX TRANSMISSION COVER SHEET

TO:	**FAX NO.: 12126185157**
FROM: Andrew Kurland	**TELEPHONE NO.: 212-506-3306**

DATE: 16/10/2017
18:28:30 EDT

COVER MESSAGE

Attached please find a stipulation adjourning petitioner's motion from October 17, 2017 to December 8, 2017. Thank you.

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IF YOU DO NOT RECEIVE ALL OF THE PAGES OR FIND THAT THEY ARE ILLEGIBLE, PLEASE CALL (212) 506-1842.

Andrew R. Kurland

From:	Judith Bachman <judith@thebachmanlawfirm.com>
Sent:	Monday, October 16, 2017 5:37 PM
To:	Steven Riker
Cc:	Dellaportas, John; Andrew R. Kurland; Michael P. Bowen
Subject:	Re: E/O Genger - File No. 2008-0017

Again, any date in December before the 14th is fine for me. Please sign accordingly.

THE BACHMAN
LAW FIRM

Judith Bachman, Esq.
Trusted Legal Counsel for You and Your Business

P: 845.639.3210 **C:** 845.300.1595
Judith@thebachmanlawfirm.com
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254 S. Main Street | Suite 306 | New City, NY 10956

On Mon, Oct 16, 2017 at 5:34 PM, Steven Riker <sr@stevenrikerlaw.com> wrote:

I would prefer the 8th, to have a few extra days, but either is ok.

Very truly yours,

Steven Riker, Esq.
Law Office of Steven Riker
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t 212.661.6410 | f 212.994.2146
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Andrew R. Kurland

From: Dellaportas, John <JDellaportas@KelleyDrye.com>
Sent: Monday, October 16, 2017 5:37 PM
To: Steven Riker
Cc: Judith Bachman; Andrew R. Kurland; Michael P. Bowen
Subject: Re: E/O Genger - File No. 2008-0017

Ok to sign for me on 8th.

On Oct 16, 2017, at 5:34 PM, Steven Riker <sr@stevenrikerlaw.com> wrote:

> I would prefer the 8th, to have a few extra days, but either is ok.
>
> Very truly yours,
>
> Steven Riker, Esq.
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> t 212.661.6410 | f 212.994.2146
> SR@stevenrikerlaw.com
>
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From: Judith Bachman <judith@thebachmanlawfirm.com>
Sent: Monday, October 16, 2017 5:31:06 PM
To: Dellaportas, John
Cc: Andrew R. Kurland; Steven Riker; Michael P. Bowen
Subject: Re: E/O Genger - File No. 2008-0017

Me too.

Judith Bachman, Esq.

STATE OF NEW YORK
SURROGATE'S COURT: COUNTY OF NEW YORK

- x

In the Matter of the Application of
ORLY GENGER, as a person interested, for the
removal of DALIA GENGER as Trustee of the
Orly Genger 1993 Trust pursuant to SCPA §711(11)

NOTICE OF SUBSTITUTION

File No. 0017/2008

- x

PLEASE TAKE NOTICE that the Judith Bachman, Esq., 254 S Main St, New City, NY 10956, (845) 639-3210, is hereby substituted as attorney of record for Dalia Genger in this proceeding in lieu of Pedowitz & Meister LLP.

Judith L. Bachman
Incoming attorney

Pedowitz & Meister LLP

By _____
Robert A. Meister
Outgoing attorneys

Consented to:
Dalia Genger
Dalia Genger

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

On the 14 day of ~~November~~ December, 2017, before me personally came Dalia Genger, to me known and known to me to be the person described in this document, who executed the foregoing consent and acknowledged to me that she executed the same.

Notary Public

ROBERT A. MEISTER
Notary Public, State of New York
No. 31-02ME2653350
Qualified in New York County
Commission Expires March 30, 2019

STATE OF NEW YORK
SURROGATES COURT: COUNTY OF NEW YORK

----------X

In the Matter of the Application of
ORLY GENGER, as a person interested, for the
removal of DALIA GENGER as Trustee of the
Orly Genger 1993 Trust pursuant to SCPA §711(11)

File No. 0017/2009

AFFIDAVIT OF SERVICE

----------X

State of New York)
) ss:
County of New York)

Jeremy Busch, being sworn, deposes and says:

I am over the age of 18, and reside at 570 Lexington Avenue, 18th Fl., New York, NY 10022.

On the 14th day of December, 2017, deponent served the attached Notice of Substitution via regular mail on:

Eric D. Herschmann, Esq.
Michael P. Bowen, Esq.
Andrew Kurland
Kasowitz Benson Torres LLP
1633 Broadway
New York, New York 10019
Attorneys for Petitioner and

John Dellaportas, Esq.
Kelley Drye & Warren LLP
101 Park Avenue, 30th Floor
New York, New York 10178
Attorney for Sagi Genger Trust and

Steven Riker, Esq.
60 E. 42nd St. 46th Floor
New York, New York 10165
Guardian *ad Litem*

Jeremy Busch

Subscribed and Sworn to
before me this 14th day
of December 2017

Notary Public

ROBERT A. MEISTER
Notary Public, State of New York
No. 31-02ME2653350
Qualified in New York County
Commission Expires March 30, 2019

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of ORLY GENGER, as a person interested for the removal of DALIA GENGER as Trustee of the Orly Genger 1993 Trust pursuant to SCPA §711(11)	File No.: 2008 ~~2018~~-0017 Surrogate Nora S. Anderson

PLEASE TAKE NOTICE that, on July 12, 2019 (the "Petition Date") at approximately 8:30 p.m. eastern time, petitioner/cross-claim defendant Orly Genger filed a voluntary petition for bankruptcy pursuant to Chapter 7 of Title 11 of the United States Code in the United States Bankruptcy Court for the Western District of Texas, under Case No. 19-bk-10926.

PLEASE TAKE FURTHER NOTICE that, pursuant to 11. U.S.C. § 362, *inter alia*, the commencement or continuation of a judicial, administrative, or other action or proceeding against petitioner/cross-claim defendant Orly Genger that was or could have been commenced before the Petition Date, including this action, is stayed as of the Petition Date. Additional information about the bankruptcy can be obtained by reviewing the docket of the matter (*see* https://www.txwb.uscourts.gov/) or contacting counsel for debtor at:

Eric Taube, Esq.
(512) 385-6400
Eric.Taube@wallerlaw.com
Waller Lansden Dortch & Davis, LLP
100 Congress Avenue, Suite 1800
Austin, Texas 78701

Dated: New York, New York
July 15, 2019

Respectfully submitted,

KASOWITZ BENSON TORRES LLP

By: _____

Michael Paul Bowen
(mbowen@kasowitz.com)
Andrew R. Kurland
(akurland@kasowitz.com)
1633 Broadway
New York, NY 10019
(212) 506-1700

Attorneys for petitioner/cross-claim defendant Orly Genger

TO (via FedEx):

Judith Bachman, Esq.
254 S. Main Street
Suite 306
New City, NY 10956

Counsel for Respondent Dalia Genger

Spencer I. Schneider, Esq.
39 Broadway, 32nd Floor
New York, NY 10006

Counsel for Successor Trustee Michael Oldner

John Dellaportas, Esq.
EMMET, MARVIN & MARTIN LLP
120 Broadway, 32nd Floor
New York, NY 10271

Counsel to the Sagi Genger 1993 Trust

Steven Riker, Esq.
Law Office of Steven Riker
One Grand Central Place, 46th Floor
New York, New York 10165

Guardian Ad Litem

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of
ORLY GENGER, as a person interested for the removal of DALIA GENGER as Trustee of the Orly Genger 1993 Trust pursuant to SCPA §711(11

File No.: 2008-0017

Surrogate Nora S. Anderson

AFFIRMATION OF SERVICE

I am an attorney admitted to practice before the Courts of the State of New York. On July 15, 2019, on behalf of petitioner/cross-claim defendant Orly Genger, I caused to be served by FedEx overnight delivery a true and correct copy of petitioner/cross-claim defendant Orly Genger's Notice of Bankruptcy, dated July 15, 2019 on parties at the following addresses:

Judith Bachman, Esq.
254 S. Main Street
Suite 306
New City, NY 10956

Counsel for Petitioner Dalia Genger

Spencer I. Schneider, Esq.
39 Broadway, 32nd Floor
New York, NY 10006

Counsel for Successor Trustee Michael Oldner

John Dellaportas, Esq.
EMMET, MARVIN & MARTIN LLP
120 Broadway, 32nd Floor
New York, NY 10271

Counsel for Sagi Genger

Steven Riker, Esq.
Law Office of Steven Riker
One Grand Central Place, 46th Floor
New York, New York 10165

Guardian Ad Litem

Dated: New York, New York
July 15, 2019

Andrew R. Kurland

SURROGATE'S COURT : NEW YORK COUNTY

----------X

In the Matter of the Application of Orly Genger to Remove Dalia Genger as Trustee of The Orly Genger 1993 Trust Established on December 13, 1993, by

File No. 2008-0017

ARIE GENGER,

Grantor.

----------X

A N D E R S O N, S .

The court has been notified that Orly Genger, petitioner and counter-claim respondent in the above-captioned proceeding, has filed for bankruptcy, pursuant to Chapter 7 of Title 11 of the United States Code, in the United States Bankruptcy Court for the Western District of Texas under Case No. 19-bk-10926. Accordingly, this proceeding has been automatically stayed (*see* 11 USC § 362).

Proceed accordingly.

Dated: August 20, 2019

NSA

S U R R O G A T E